

U.S. DISTRICT COURT
U.S. District Court, Western District of New York (Rochester)
CIVIL DOCKET FOR CASE #: 6:07-cv-06123-MWP

Carroll v. County of Monroe et al
Assigned to: Hon. Marian W. Payson
Cause: 42:1983 Civil Rights Act

Date Filed: 03/01/2007
Date Terminated: 06/30/2011
Jury Demand: Both
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Sherry Carroll
*Individually and as Natural Parent
& Legal Guardian on behalf of David
Carroll & Devan White, both Infants
under the age of eighteen (18)*

represented by **Christina A. Agola**
1415 Monroe Avenue
Brighton, NY 14618
585-262-3320
Fax: 585-262-3325
Email: cagola@wnycivilrights.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Dana Marie Campbell
Christina A. Agola, PLLC
28 East Main Street
Suite 2100
Rochester, NY 14618
585-262-3320
Fax: 585-262-3325
Email: danalaw@mac.com
TERMINATED: 08/31/2009
LEAD ATTORNEY

V.

Defendant

County of Monroe

represented by **Paul D. Fuller**
Monroe County Law Department,
Litigation Division
39 West Main Street
Suite 307
Rochester, NY 14614
(585) 753-1472
Fax: (585) 753-1369
Email: paulfuller@monroecounty.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian Edward Marianetti
307 County Office Building
39 West Main Street
Rochester, NY 14614
585-753-1495
Fax: 585-324-4229
Email: bmarianetti@monroecounty.gov
ATTORNEY TO BE NOTICED

Matthew J. Clark
Monroe County Department of Law
39 West Main Street
Room 307
Rochester, NY 14614
585-428-2572

Fax: 585-324-4238
Email: mclark@monroecounty.gov
TERMINATED: 07/24/2008

Defendant

Monroe County Sheriff's Department

represented by **Paul D. Fuller**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian Edward Marianetti
(See above for address)
ATTORNEY TO BE NOTICED

Matthew J. Clark
(See above for address)
TERMINATED: 07/24/2008

Defendant

Patrick O'Flynn

*Sheriff of the Monroe County's Sheriff
Department, In his official capacity*

represented by **Paul D. Fuller**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian Edward Marianetti
(See above for address)
ATTORNEY TO BE NOTICED

Matthew J. Clark
(See above for address)
TERMINATED: 07/24/2008

Defendant

Deputy Sheriff James Carroll

In his official and Individual Capacity

represented by **Paul D. Fuller**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian Edward Marianetti
(See above for address)
ATTORNEY TO BE NOTICED

Matthew J. Clark
(See above for address)
TERMINATED: 07/24/2008

Defendant

**The Greater Rochester Area Narcotics
Enforcement Team (GRANET)**

TERMINATED: 04/03/2008

Defendant

Officer Michael R. Desain

In his official and individual capacity
TERMINATED: 08/16/2010

represented by **Eugene Welch**
Harris Chesworth O'Brien Johnstone
Welch & Leone LLP
300 Linden Oaks
Suite 100
Rochester, NY 14625
585-899-1414
Fax: 585-899-1426
Email: ewelch@rochester.rr.com
TERMINATED: 08/16/2010

LEAD ATTORNEY

Defendant

Sgt. Robert Throwbridge

In his official and individual capacity

Defendant

Sgt. John Hendersen

In his official and individual capacity

Defendant

Chief Merrit Rahn

In his Official and Individual Capacity

Defendant

Town of Brighton

TERMINATED: 08/16/2010

represented by **Eugene Welch**

(See above for address)

TERMINATED: 08/16/2010

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Defendant

Town of Brighton Police Department

TERMINATED: 08/16/2010

represented by **Eugene Welch**

(See above for address)

TERMINATED: 08/16/2010

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Defendant

Town of Greece

Defendant

Town of Greece Police Department

Defendant

Deputy Mike Hogan

In his Official and Individual Capacities

Defendant

Officer Joseph Hopper

In his Official and Individual Capacities

Defendant

Officer Jose Celorio

In his Official and Individual Capacities

Defendant

Lieutenant Steve Chatterton

In his Official and Individual Capacities

Defendant

Gary Pignato

In his Official and Individual Capacities

Defendant

Officer David Robbins

In his Official and Individual Capacities

Defendant**Officer Anthony Waltarmyer***In his Official and Individual Capacities*

Date Entered	#	Docket Text
03/07/2007	<u>1</u>	COMPLAINT against Robert Throwbridge, John Hendersen, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, James Carroll, The Greater Rochester Area Narcotics Enforcement Team (GRANET), Michael R. Desain (Filing fee \$350 receipt number0487.), filed by Sherry Carroll.(TO,) (Entered: 03/07/2007)
03/07/2007		Summons Issued as to Robert Throwbridge, John Hendersen, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, James Carroll, The Greater Rochester Area Narcotics Enforcement Team (GRANET), Michael R. Desain. (TO,) (Entered: 03/07/2007)
03/14/2007	<u>2</u>	ORDER REFERRING CASE to Magistrate Judge Marian W. Payson. Signed by Hon. Charles J. Siragusa on 3/12/07. (TO,) (Entered: 03/14/2007)
03/16/2007	<u>3</u>	ANSWER to Complaint with Jury Demand by County of Monroe.(Clark, Matthew) (Entered: 03/16/2007)
03/30/2007	<u>4</u>	ANSWER to Complaint with Jury Demand by Monroe County Sheriff's Department, Patrick O'Flynn.(Clark, Matthew) (Entered: 03/30/2007)
05/18/2007	<u>5</u>	ANSWER to Complaint with Jury Demand by Michael R. Desain. (Attachments: # <u>1</u> Certificate of Service)(Welch, Eugene) (Entered: 05/18/2007)
05/18/2007	<u>6</u>	CERTIFICATE OF SERVICE by Michael R. Desain re <u>5</u> Answer to Complaint (Welch, Eugene) (Entered: 05/18/2007)
11/27/2007	<u>7</u>	SUMMONS Returned Executed by Sherry Carroll. John Hendersen served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/27/2007	<u>8</u>	SUMMONS Returned Executed by Sherry Carroll. Michael R. Desain served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/27/2007	<u>9</u>	SUMMONS Returned Executed by Sherry Carroll. James Carroll served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/27/2007	<u>10</u>	SUMMONS Returned Executed by Sherry Carroll. County of Monroe served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/27/2007	<u>11</u>	SUMMONS Returned Executed by Sherry Carroll. Monroe County Sheriff's Department served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/27/2007	<u>12</u>	SUMMONS Returned Executed by Sherry Carroll. The Greater Rochester Area Narcotics Enforcement Team (GRANET) served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/27/2007	<u>13</u>	SUMMONS Returned Executed by Sherry Carroll. Robert Throwbridge served on 3/2/2007, answer due 3/22/2007. (Agola, Christina) (Entered: 11/27/2007)
11/29/2007	<u>14</u>	ORDER Scheduling Conference set for 12/19/2007 10:40 AM before Hon. Marian W. Payson. Signed by Hon. Marian W. Payson on 11/27/2007. (KAH) (Entered: 11/29/2007)
12/03/2007		NOTICE: Scheduling Conference adjourned from 12/19/2007 to 1/3/2008 at 11:00 AM before Hon. Marian W. Payson. (KAH) (Entered: 12/03/2007)
01/02/2008	<u>15</u>	DISCOVERY PLAN by Sherry Carroll.(Agola, Christina) (Entered: 01/02/2008)
01/04/2008	<u>16</u>	CONSENT to Jurisdiction by US Magistrate Judge by Robert Throwbridge, John Hendersen, Sherry Carroll, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, James Carroll, The Greater Rochester Area Narcotics Enforcement Team (GRANET), Michael R. Desain. Case reassigned to Magistrate

		Judge Marian W. Payson. Signed by Hon. Charles J. Siragusa on 1/3/08. (TO) (Entered: 01/04/2008)
01/08/2008	<u>17</u>	SCHEDULING ORDER: Status Conference set for 6/18/2008 11:20 AM before Hon. Marian W. Payson. Mandatory Disclosure due by 1/17/2008. Join Parties/Amend Pleadings due by 2/15/2008. Fact Discovery completed by 7/18/2008. Plaintiff Expert Witness ID due by 8/18/2008. Defendant Expert Witness ID due by 9/18/2008. Expert Discovery due by 11/18/2008. Dispositive Motions due by 1/20/2009. Signed by Hon. Marian W. Payson on 1/4/2008. (KAH) (Entered: 01/08/2008)
01/10/2008	18	Minute Entry for proceedings held before Judge Marian W. Payson : Scheduling Conference held on 1/3/2008. Appearances: Christina A. Agola, Esq. for plaintiff; Matthew J. Clark, Esq. and Eugene Welch, Esq. for defendants (CAM) (Entered: 01/10/2008)
02/15/2008	<u>19</u>	First MOTION to Amend/Correct by Sherry Carroll. (Attachments: # <u>1</u> Declaration# <u>2</u> Memo of Law)(Agola, Christina) (Entered: 02/15/2008)
02/29/2008	<u>20</u>	MOTION SCHEDULING ORDER re <u>19</u> First MOTION to Amend/Correct filed by Sherry Carroll. Responses due by 3/14/2008. Motion Hearing set for 4/1/2008 3:00 PM before Hon. Marian W. Payson. Signed by Hon. Marian W. Payson on 2/29/2008. (KAH) (Entered: 02/29/2008)
04/02/2008	<u>21</u>	DECISION & ORDER granting <u>19</u> Motion to Amend or Correct. The Clerk of the Court is directed to file plaintiff's "Proposed Amended Complaint" (Docket #19-2, Ex. A) as the Amended Complaint. Signed by Hon. Marian W. Payson on 4/2/2008. (KAH) (Entered: 04/02/2008)
04/04/2008	<u>22</u>	AMENDED COMPLAINT against Jose Celorio, Steve Chatterton, Mike Hogan, Joseph Hopper, Gary Pignato, Merrit Rahn, David Robbins, Town of Brighton Police Department, Town of Brighton, Town of Greece Police Department, Town of Greece, Anthony Waltarmyer, Robert Throwbridge, John Hendersen, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, James Carroll, Michael R. Desain, filed by Merrit Rahn, Town of Brighton, Town of Brighton Police Department, Town of Greece, Town of Greece Police Department, Mike Hogan, Joseph Hopper, Jose Celorio, Steve Chatterton, Gary Pignato, David Robbins, Anthony Waltarmyer, Sherry Carroll.(TO) (Entered: 04/04/2008)
04/10/2008	<u>23</u>	ANSWER to <u>22</u> Amended Complaint,, by County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, James Carroll.(Clark, Matthew) (Entered: 04/10/2008)
04/11/2008	<u>24</u>	ANSWER to <u>22</u> Amended Complaint,, by Town of Brighton, Town of Brighton Police Department, Michael R. Desain. (Attachments: # <u>1</u> Certificate of Service)(Welch, Eugene) (Entered: 04/11/2008)
04/11/2008	<u>25</u>	AMENDED DOCUMENT by County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, James Carroll. Amendment to <u>23</u> Answer to Amended Complaint <i>Amended Answer to Amended Complaint</i> . (Attachments: # <u>1</u> Certificate of Service)(Clark, Matthew) (Entered: 04/11/2008)
05/05/2008		Summons Issued as to Merrit Rahn, Town of Brighton, Town of Brighton Police Department, Town of Greece, Town of Greece Police Department, Mike Hogan, Joseph Hopper, Jose Celorio, Steve Chatterton, Gary Pignato, David Robbins, Anthony Waltarmyer. (TO) (Entered: 05/05/2008)
06/18/2008	<u>26</u>	AMENDED SCHEDULING ORDER: Status Conference adjourned to 7/22/2008 11:20 AM before Hon. Marian W. Payson. Fact Discovery to be completed by 10/16/2008. Plaintiff Expert Witness ID due by 11/17/2008. Defendant Expert Witness ID due by 12/17/2008. Expert Discovery to be completed by 2/17/2009. Dispositive Motions due by 4/20/2009. Signed by Hon. Marian W. Payson on 6/18/2008. (KAH) (Entered: 06/18/2008)
07/24/2008	<u>27</u>	NOTICE of Appearance by Paul D. Fuller on behalf of County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, and James Carroll. (TO) Modified on 7/25/2008 (JHF). (Entered: 07/24/2008)

07/25/2008		E-Filing Notification: revised docket text of <u>27</u> NOTICE of Appearance to include only the defendants that Paul D. Fuller is representing: County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn, and James Carroll. Terminated Fuller's association with the defendants he is not representing. (JHF) (Entered: 07/25/2008)
07/28/2008		NOTICE: Telephone Conference set for 8/13/2008 at 10:40 AM before Hon. Marian W. Payson. Plaintiff's counsel will initiate the conference call. (KAH) (Entered: 07/28/2008)
07/31/2008	28	Minute Entry for proceedings held before Hon. Marian W. Payson: Status Conference held on 7/22/2008. Appearances: Jason Little, Esq. for plaintiff. For defendants: Eugene Welch, Esq. and Paul Fuller, Esq., by telephone (CAM) (Entered: 07/31/2008)
08/18/2008	<u>29</u>	AMENDED SCHEDULING ORDER: Status Conference set for 4/7/2009 10:40 AM before Hon. Marian W. Payson. Fact Discovery to be completed by 4/30/2009. Plaintiff Expert Witness ID due by 6/1/2009. Defendant Expert Witness ID due by 7/1/2009. Expert Discovery to be completed by 9/1/2009. Dispositive Motions due by 11/2/2009. Signed by Hon. Marian W. Payson on 8/15/2008. (KAH) (Entered: 08/18/2008)
08/19/2008	30	Minute Entry for proceedings held before Hon. Marian W. Payson: Status Conference held on 8/13/2008. Appearances: Jason Little, Esq. for plaintiff; Paul Fuller, Esq. and Eugene Welch, Esq. by telephone for defendants (CAM) (Entered: 08/19/2008)
04/09/2009	<u>31</u>	ORDER Plaintiff's counsel to serve and file an affidavit with the Court by 4/14/2009 regarding service as to the Town of Greece, Town of Greece Police Department, Deputy Mike Hogan, Officer Joseph Hopper, Officer Jose Celorio, Lieutenant Steven Chatterton, Gary Pignato, Officer David Robbins and Officer Anthony Waltarmyer. Signed by Hon. Marian W. Payson on 4/9/2009. (KAH) (Entered: 04/09/2009)
04/13/2009	32	Minute Entry for proceedings held before Hon. Marian W. Payson: Status Conference held on 4/7/2009. Appearances: Dana Campbell, Esq. for plaintiff; Paul Fuller, Esq. and Eugene Welch, Esq. (CAM) (Entered: 04/13/2009)
04/14/2009	<u>33</u>	DECLARATION by Sherry Carroll in response to <u>31</u> Order, (Agola, Christina) Modified text on 4/15/2009 (TO). (Entered: 04/14/2009)
04/15/2009		E-Filing Notification: Description of document modified <u>33</u> DECLARATION. Choose event that closely relates to the document you are filing (TO) (Entered: 04/15/2009)
04/15/2009	<u>34</u>	NOTICE of Appearance by Christina A. Agola on behalf of Sherry Carroll (Agola, Christina) (Entered: 04/15/2009)
04/20/2009	<u>35</u>	AMENDED SCHEDULING ORDER (Please Note: This docket text may <u>not</u> contain the entire contents of the attached Order. It is your responsibility to read the attached Order and download it for future reference. Direct any questions to the Chambers of the Judge who entered this Order.) Status Conference set for 7/14/2009 11:20 AM before Hon. Marian W. Payson . Fact Discovery to be completed by 7/29/2009. Plaintiff Expert Witness ID due by 8/31/2009. Defendant Expert Witness ID due by 9/29/2009. Expert Discovery to be completed by 11/30/2009. Dispositive Motions due by 2/1/2010. Signed by Hon. Marian W. Payson on 4/15/2009. (KAH) (Entered: 04/20/2009)
05/04/2009	<u>36</u>	STIPULATION AND ORDER granting plaintiff leave to amend her complaint to remove any non-party to the litigation pursuant to Rule 15 of the Fed. R. Civ. P. Signed by Hon. Marian W. Payson on 5/1/2009. (KAH) (Entered: 05/04/2009)
07/06/2009		NOTICE: Status Conference adjourned from 7/14/2009 to 8/18/2009 at 11:20 AM before Hon. Marian W. Payson. (KAH) (Entered: 07/06/2009)
08/31/2009	<u>37</u>	NOTICE by Sherry Carroll of Counsel's Withdrawal (Attachments: # <u>1</u> Certificate of Service)(Agola, Christina) (Entered: 08/31/2009)

09/01/2009	<u>38</u>	AMENDED SCHEDULING ORDER, (Status Conference set for 10/21/2009 11:00 AM before Hon. Marian W. Payson, factual Discovery completed by 10/30/2009, Motions due by 5/3/2010, plaintiff shall identify any expert witnesses and provide reports by 11/30/09, defendants by 12/31/09, expert discovery and depositions by 3/1/2010). Signed by Hon. Marian W. Payson on 8/31/09. (TO) (Entered: 09/01/2009)
10/28/2009	<u>39</u>	AMENDED SCHEDULING/CASE MANAGEMENT ORDER (Please Note: This docket text may <u>not</u> contain the entire contents of the attached Order. It is your responsibility to read the attached Order and download it for future reference. Direct any questions to the Chambers of the Judge who entered this Order.) Dispositive Motions due by 3/19/2010. Signed by Hon. Marian W. Payson on 10/26/2009. (KAH) (Entered: 10/28/2009)
10/30/2009	40	Minute Entry for proceedings held before Hon. Marian W. Payson: Status Conference held on 10/21/2009. Appearances: Jason A. Little, Esq. for plaintiff; Paul Fuller, Esq. and Eugene Welch, Esq. for defendants (CAM) (Entered: 10/30/2009)
03/19/2010	<u>41</u>	MOTION for Summary Judgment by Town of Brighton, Town of Brighton Police Department, Michael R. Desain. (Attachments: # <u>1</u> Statement of Facts, # <u>2</u> Memorandum in Support, # <u>3</u> Affidavit of Eugene Welch, # <u>4</u> Exhibit A to Affidavit of Eugene Welch)(Welch, Eugene) (Entered: 03/19/2010)
03/19/2010	<u>42</u>	CONTINUATION OF EXHIBITS to <u>41</u> MOTION for Summary Judgment <i>Exhibits of Welch Affidavit</i> . (Attachments: # <u>1</u> Exhibit B 2 of 3, # <u>2</u> Exhibit B 3 of 3, # <u>3</u> Exhibit C 1 of 4)(Welch, Eugene) (Entered: 03/19/2010)
03/19/2010	<u>43</u>	CONTINUATION OF EXHIBITS to <u>41</u> MOTION for Summary Judgment, <u>42</u> Continuation of Exhibits <i>Exhibits of Welch Affidavit</i> . (Attachments: # <u>1</u> Exhibit C 3 of 4, # <u>2</u> Exhibit C 4 of 4, # <u>3</u> Exhibit D, # <u>4</u> Exhibit E)(Welch, Eugene) (Entered: 03/19/2010)
03/19/2010	<u>44</u>	CONTINUATION OF EXHIBITS to <u>41</u> MOTION for Summary Judgment, <u>42</u> Continuation of Exhibits, <u>43</u> Continuation of Exhibits <i>Welch Affidavit</i> . (Attachments: # <u>1</u> Exhibit F 2 of 2, # <u>2</u> Exhibit G, # <u>3</u> Exhibit H, # <u>4</u> Exhibit I)(Welch, Eugene) (Entered: 03/19/2010)
03/19/2010	<u>45</u>	CONTINUATION OF EXHIBITS to <u>41</u> MOTION for Summary Judgment, <u>44</u> Continuation of Exhibits, <u>42</u> Continuation of Exhibits, <u>43</u> Continuation of Exhibits <i>Welch Affidavit</i> . (Attachments: # <u>1</u> Exhibit K, # <u>2</u> Exhibit L, # <u>3</u> Exhibit M, # <u>4</u> Exhibit N, # <u>5</u> Exhibit O, # <u>6</u> Exhibit P, # <u>7</u> Exhibit Q)(Welch, Eugene) (Entered: 03/19/2010)
03/19/2010	<u>46</u>	AFFIDAVIT re <u>41</u> MOTION for Summary Judgment by Town of Brighton, Town of Brighton Police Department, Michael R. Desain. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Exhibit 6, # <u>7</u> Exhibit 7, # <u>8</u> Exhibit 8)(Welch, Eugene) (Entered: 03/19/2010)
03/19/2010	<u>47</u>	CERTIFICATE OF SERVICE by Town of Brighton, Town of Brighton Police Department, Michael R. Desain re <u>41</u> MOTION for Summary Judgment, <u>44</u> Continuation of Exhibits, <u>42</u> Continuation of Exhibits, <u>45</u> Continuation of Exhibits, <u>46</u> Affidavit, <u>43</u> Continuation of Exhibits (Welch, Eugene) (Entered: 03/19/2010)
03/25/2010	<u>48</u>	ORDER re <u>41</u> MOTION for Summary Judgment filed by Town of Brighton, Michael R. Desain, Town of Brighton Police Department. Responses due by 4/16/2010. Replies due by 5/7/2010. Motion Hearing set for 6/17/2010 02:00 PM before Hon. Marian W. Payson. Signed by Hon. Marian W. Payson on 3/24/10. (CAM) (Entered: 03/25/2010)
04/29/2010	<u>49</u>	LETTER ORDER granting request for an extension of the motion scheduling order re <u>41</u> MOTION for Summary Judgment filed by Town of Brighton, Michael R. Desain, Town of Brighton Police Department. (Responses due by 5/17/2010. Replies due by 6/7/2010. Motion Hearing set for 6/17/2010 at 2:00 PM before Hon. Marian W. Payson.) Signed by Hon. Marian W. Payson on 4/27/2010. (KAH) (Entered: 04/29/2010)

05/19/2010	<u>50</u>	AMENDED MOTION SCHEDULING ORDER re <u>41</u> MOTION for Summary Judgment filed by Town of Brighton, Michael R. Desain, Town of Brighton Police Department. (Responses due by 6/17/2010. Replies due by 7/16/2010. Motion Hearing set for 8/18/2010 at 2:00 PM before Hon. Marian W. Payson.) Signed by Hon. Marian W. Payson on 5/18/2010. (KAH) (Entered: 05/19/2010)
06/09/2010	<u>51</u>	AMENDED MOTION SCHEDULING ORDER re <u>41</u> MOTION for Summary Judgment filed by Town of Brighton, Michael R. Desain, Town of Brighton Police Department. (Responses due by 7/19/2010. Replies due by 8/31/2010. Motion Hearing set for 9/14/2010 at 11:00 AM before Hon. Marian W. Payson.) Signed by Hon. Marian W. Payson on 6/9/2010. (KAH) (Entered: 06/09/2010)
07/27/2010		NOTICE: Trial Date Status Conference set for 8/17/2010 at 10:30 AM before Hon. Marian W. Payson. (KAH) (Entered: 07/27/2010)
08/16/2010	<u>52</u>	STIPULATION AND ORDER OF DISMISSAL as to defendants Officer Michael R. Desain, in His Own Official and Individual Capacity, Town of Brighton and Town of Brighton Police Department. Signed by Hon. Marian W. Payson on 8/16/2010. (KAH) (Entered: 08/16/2010)
08/25/2010	53	Minute Entry for proceedings held before Hon. Marian W. Payson: Trial Date Status Conference held on 8/17/2010. Appearances: Christina A. Agola, Esq., by telephone, for plaintiff; Paul D. Fuller, Esq. for defendants (CAM) Modified on 8/25/2010 (CAM). (Entered: 08/25/2010)
08/25/2010		E-Filing Notification: TEXT CORRECTED. 53 Minute Entry for proceedings held before Hon. Marian W. Payson: Status Conference held on 8/17/2010. Appearances: Christina A. Agola, Esq., by telephone, for plaintiff; Paul D. Fuller, Esq. for defendants (CAM) (CAM) (Entered: 08/25/2010)
10/04/2010	<u>54</u>	PRETRIAL ORDER (Final Pretrial Conference set for 3/3/2011 at 2:00 PM before Hon. Marian W. Payson, Jury Trial set for 4/4/2011 at 9:30 AM before Hon. Marian W. Payson.) Signed by Hon. Marian W. Payson on 10/1/2010. (KAH) (Entered: 10/04/2010)
03/03/2011	<u>55</u>	NOTICE of Appearance by Brian Edward Marianetti on behalf of James Carroll, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn (Attachments: # <u>1</u> Certificate of Service)(Marianetti, Brian) (Entered: 03/03/2011)
03/04/2011		NOTICE: Final Pretrial Conference set for 4/1/2011 at 11:00 AM before Hon. Marian W. Payson. (KAH) (Entered: 03/04/2011)
03/08/2011	56	Minute Entry for proceedings held before Hon. Marian W. Payson: Initial Pretrial Conference held on 3/3/2011. Appearances: Christina A. Agola, Esq. for plaintiff; Paul D. Fuller, Esq. and Brian Marianetti, Esq. for defendants (CAM) (Entered: 03/08/2011)
03/11/2011	<u>57</u>	MOTION in Limine by Sherry Carroll. (Attachments: # <u>1</u> Declaration of Counsel, # <u>2</u> Memorandum in Support, # <u>3</u> Certificate of Service)(Agola, Christina) (Entered: 03/11/2011)
03/14/2011	<u>58</u>	ORDER re <u>57</u> MOTION in Limine filed by Sherry Carroll. Responses due by 3/21/2011. Replies due by 3/24/2011. Motion Hearing set for 4/1/2011 11:00 AM before Hon. Marian W. Payson. Signed by Hon. Marian W. Payson on 3/14/11. (CAM) (Entered: 03/14/2011)
03/17/2011	<u>59</u>	MOTION in Limine by James Carroll, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn. (Attachments: # <u>1</u> Declaration of Counsel, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Exhibit D, # <u>6</u> Exhibit E, # <u>7</u> Exhibit F, # <u>8</u> Exhibit G, # <u>9</u> Exhibit H, # <u>10</u> Memorandum in Support, # <u>11</u> Certificate of Service)(Marianetti, Brian) (Entered: 03/17/2011)
03/18/2011	<u>60</u>	ORDER re <u>59</u> MOTION in Limine filed by County of Monroe, Monroe County Sheriff's Department, James Carroll, Patrick O'Flynn. Responses due by 3/25/2011. Motion Hearing set for 4/1/2011 11:00 AM before Hon. Marian W. Payson. Signed by Hon. Marian W. Payson on 3/18/11. (CAM) (Entered: 03/18/2011)

03/18/2011	<u>61</u>	RESPONSE in Opposition re <u>57</u> MOTION in Limine filed by James Carroll, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Memorandum in Support, # <u>4</u> Certificate of Service)(Marianetti, Brian) (Entered: 03/18/2011)
03/25/2011	<u>62</u>	RESPONSE in Opposition re <u>59</u> MOTION in Limine filed by Sherry Carroll. (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Certificate of Service)(Agola, Christina) (Entered: 03/25/2011)
04/04/2011	63	Minute Entry for proceedings held before Hon. Marian W. Payson: Telephone Conference held on 3/29/2011. Appearances: Christina A. Agola, Esq. for plaintiff; Paul D. Fuller, Esq. for defendants (CAM) (Entered: 04/04/2011)
04/13/2011		NOTICE as to <u>59</u> MOTION in Limine, <u>57</u> MOTION in Limine. Motion Hearing set for 6/1/2011 02:00 PM before Hon. Marian W. Payson. (CAM) (Entered: 04/13/2011)
04/13/2011		NOTICE: Jury Trial to commence 6/27/2011 09:30 AM before Hon. Marian W. Payson. (CAM) (Entered: 04/13/2011)
06/03/2011	<u>64</u>	ORDER granting in part, denying in part and reserving in part <u>57</u> Motion in Limine; granting in part, denying in part and reserving in part <u>59</u> Motion in Limine. Signed by Hon. Marian W. Payson on 6/1/2011. (KAH) (Entered: 06/03/2011)
06/09/2011	65	Minute Entry for proceedings held before Hon. Marian W. Payson: Motion Hearing held on 6/1/2011 re <u>59</u> MOTION in Limine filed by County of Monroe, Monroe County Sheriff's Department, James Carroll, Patrick O'Flynn, <u>57</u> MOTION in Limine filed by Sherry Carroll. Plaintiffs motion in limine (#57) is granted in part, denied in part and reserved in part. Defendants motion in limine (#59) is granted in part, denied in part and reserved in part. Appearances: Christina A. Agola, Esq. for plaintiff; Paul D. Fuller, Esq. and Brian Marianetti, Esq. for defendants(Digital Recording) (CAM) (Entered: 06/09/2011)
06/24/2011	<u>66</u>	AFFIDAVIT by Sherry Carroll. (Agola, Christina) (Entered: 06/24/2011)
06/24/2011	67	Minute Entry for proceedings held before Hon. Marian W. Payson: Telephone Conference held on 6/24/2011. Appearances: Christina A. Agola, Esq. for plaintiff; Paul D. Fuller, Esq. for defendants (CAM) (Entered: 06/24/2011)
06/27/2011		E-Filing Notification: No proof of service. Action required: File proof of service <u>66</u> AFFIDAVIT by Sherry Carroll. (Agola, Christina) (TO) (Entered: 06/27/2011)
06/27/2011	<u>68</u>	CERTIFICATE OF SERVICE by Sherry Carroll re <u>66</u> Affidavit (Agola, Christina) (Entered: 06/27/2011)
06/28/2011	<u>69</u>	JURY VERDICT. (TO) (Entered: 06/28/2011)
06/30/2011	<u>70</u>	ORDER re <u>69</u> Jury Verdict in favor of defendant Deputy James Carroll and the Clerk of Court is directed to enter judgment in favor of defendant County of Monroe. (see order for details). Signed by Hon. Marian W. Payson on 6/29/2011. (TO) (Entered: 06/30/2011)
06/30/2011	71	Minute Entry for proceedings held before Hon. Marian W. Payson: Final Pretrial Conference held on 6/27/2011. Appearances: Christina A. Agola, Esq. for plaintiff; Paul D. Fuller, Esq. for defendants (Court Reporter Erin Keniston.) (CAM) (Entered: 06/30/2011)
06/30/2011	72	Minute Entry for proceedings held before Hon. Marian W. Payson: Voir Dire held on 6/27/2011, Jury Trial commences on 6/27/2011. Appearances: Christina A. Agola, Esq. and Steven Laprade, Esq. for plaintiff; Paul D. Fuller, Esq. and Brian Marianetti, Esq. with James F. Carroll(Court Reporter Erin Keniston.) (CAM) (Entered: 06/30/2011)
06/30/2011	73	Minute Entry for proceedings held before Hon. Marian W. Payson: Jury Trial held on 6/28/2011. Trial completed. Jury returns a verdict of no cause. Appearances: Christina A. Agola, Esq. and Steven Laprade, Esq. for plaintiff; Paul D. Fuller, Esq. and Brian Marianetti, Esq. for defendants (Court Reporter Erin Keniston.) (CAM) (Entered: 06/30/2011)

06/30/2011	<u>74</u>	JUDGMENT in favor of defendants County of Monroe and Deputy Sheriff Carroll. Signed by Clerk of Court 6/30/2011. (TO) (Entered: 06/30/2011)
07/01/2011	<u>75</u>	BILL OF COSTS by James Carroll, County of Monroe. (Attachments: # <u>1</u> Exhibit Receipts for Bill of Costs, # <u>2</u> Certificate of Service)(Fuller, Paul) (Entered: 07/01/2011)
07/01/2011	<u>76</u>	AMENDED DOCUMENT by James Carroll, County of Monroe. Amendment to <u>75</u> Bill of Costs. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Certificate of Service)(Fuller, Paul) (Entered: 07/01/2011)
07/21/2011	<u>77</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings, Jury Trial held on 6/27/2011, before Judge Marian W. Payson. Court Reporter/Transcriber Erin Keniston. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 8/10/2011. Redacted Transcript Deadline set for 8/22/2011. Release of Transcript Restriction set for 10/18/2011. (TO) (Entered: 07/21/2011)
07/21/2011	<u>78</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings, Jury Trial held on 6/28/2011, before Judge Marian W. Payson. Court Reporter/Transcriber Erin Keniston. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 8/10/2011. Redacted Transcript Deadline set for 8/22/2011. Release of Transcript Restriction set for 10/18/2011. (TO) (Entered: 07/21/2011)
07/28/2011	<u>79</u>	MOTION to Set Aside <i>Jury Verdict</i> , <i>Motion for New Trial</i> by Sherry Carroll. (Attachments: # <u>1</u> Declaration, # <u>2</u> Memorandum in Support, # <u>3</u> Appendix Volume I, Exhibits A-F, # <u>4</u> Certificate of Service)(Agola, Christina) (Entered: 07/28/2011)
08/11/2011	<u>80</u>	Costs Taxed in amount of \$ 964.38 against Sherry Carroll signed by Clerk of Court on 8/10/2011 (TO) (Entered: 08/11/2011)
08/12/2011	<u>81</u>	ORDER re <u>79</u> MOTION to Set Aside <i>Jury Verdict</i> , <i>Motion for New Trial</i> filed by Sherry Carroll. Responses due by 8/31/2011. Replies due by 9/14/2011. Motion Hearing set for 10/19/2011 02:00 PM before Hon. Marian W. Payson. Signed by Hon. Marian W. Payson on 8/12/11. (CAM) (Entered: 08/12/2011)
08/25/2011	<u>82</u>	Opposition to plaintiff's Motion to Set Aside Verdict by James Carroll, County of Monroe. (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Certificate of Service)(Fuller, Paul) Modified on 3/9/2012 (KAH). (Entered: 08/25/2011)
10/20/2011	<u>83</u>	Minute Entry for proceedings held before Hon. Marian W. Payson: Motion Hearing held on 10/19/2011 re <u>79</u> MOTION to Set Aside Jury Verdict, Motion for New Trial filed by Sherry Carroll. Motion reserved. Appearances: Christina A. Agola, Esq. for plaintiff; Paul D. Fuller, Esq. for defendants(Digital Recording) (CAM) (Entered: 10/20/2011)
03/09/2012	<u>84</u>	DECISION & ORDER Plaintiff's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial <u>79</u> is denied. Signed by Hon. Marian W. Payson on 3/9/2012. (KAH) (Entered: 03/09/2012)
03/12/2012	<u>85</u>	NOTICE OF APPEAL as to <u>84</u> Order on Motion to Set Aside by Sherry Carroll. Filing fee \$ 455, receipt number 0209-1552306. (Agola, Christina) (Entered: 03/12/2012)
03/13/2012		Pursuant to Local Rule 12.1 of the US Court of Appeals for the Second Circuit, Forms C and D must be completed within 14 days after the filing of a notice of appeal. Forms C and D can be obtained at www.ca2.uscourts.gov. (TO) (Entered: 03/13/2012)
03/21/2012	<u>86</u>	CLERKS CERTIFICATE/INDEX filed and electronically sent to Court of Appeals (Attachments: # <u>1</u> Index)(TO) (Entered: 03/21/2012)
05/14/2012	<u>87</u>	NOTICE of Appearance by Brian Edward Marianetti on behalf of James Carroll, County of Monroe, Monroe County Sheriff's Department, Patrick O'Flynn (Attachments: # <u>1</u> Certificate of Service)(Marianetti, Brian) (Entered: 05/14/2012)

04/05/2013	<u>88</u>	USCA ORDER/JUDGMENT as to <u>85</u> Notice of Appeal filed by Sherry Carroll; that the judgment of the district court is AFFIRMED in accordance with the opinion of this court.(TA) (Entered: 04/05/2013)
04/08/2013	<u>89</u>	ORDER re <u>88</u> USCA Mandate/Judgment. Signed by Hon. Marian W. Payson on 4/5/2013. (TA) (Entered: 04/08/2013)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRY CARROLL, Individually and as Natural Parent & Legal
Guardian on Behalf of DAVID CARROLL & DEVAN WHITE, Both
Infants Under the Age of Eighteen (18);

Plaintiffs,

-VS-

COUNTY OF MONROE, MONROE COUNTY SHERIFF'S
DEPARTMENT, PATRICK O'FLYNN, SHERIFF OF THE
MONROE COUNTY'S SHERIFF DEPARTMENT, In His Official
Capacity DEPUTY SHERIFF JAMES CARROLL, In His Official and
Individual Capacity, & THE GREATER ROCHESTER AREA
NARCOTICS ENFORCEMENT TEAM, ("GRANET"), OFFICER
MICHAEL R. DESAIN, In His Official and Individual Capacity;
SGT. ROBERT THROWBRIDGE, In His Official and Individual
Capacity; SGT. JOHN HENDERSEN, In His Official and
Individual Capacity,

Defendants.

COMPLAINT

Civ. No.:

JURY DEMAND

Trial by jury on all issues is demanded.

PRELIMINARY INTRODUCTION

1. This is an action brought pursuant to 42 U.S.C. § 1983 and the Fourth Amendment of the United States Constitution for the interference with the Plaintiffs' property rights, i.e. the ownership of their dogs, pursuant to the Fourth Amendment and for the use of excessive force in violation of the Fourteenth Amendment.

PARTIES

2. Plaintiff Sherry Carroll resides at 284 Ridgedale Circle, Rochester, New York 14616 which is located in the County of Monroe, State of New York.

3. Plaintiff David Carroll, by and through his natural parent and legal guardian Sherry Carroll, resides at 284 Ridgedale Circle, Rochester, New York 14616, which is located in the County of Monroe, State of New York.
4. Plaintiff Devan White, by and through his natural parent and legal guardian Sherry Carroll, resides at 284 Ridgedale Circle, Rochester, New York 14616, which is located in the County of Monroe, State of New York.
5. Upon information and belief, the Monroe County Sheriff's Department operates under the direct control of Monroe County, State of New York.
6. Defendant Patrick Flynn is the Sheriff of The Monroe County Sheriff's Department.
7. Defendant Deputy Sheriff James Carroll is a Deputy Sheriff hired and supervised by the County of Monroe. **[SHOOTER]**
8. The defendant Great Rochester Area Narcotic Enforcement Team("GRANET") is a drug task force that employs several local police agencies from Western New York located at 185 Exchange Boulevard, Rochester New York.

9. Defendants OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity, are all members of several local police agencies who are also members of GRANET who were present on the evening of October 11, 2006 during the events which form the basis of this Complaint.

JURISDICTION

10. Plaintiffs' bring this action to recover damages for the violation of their civil rights under the Fourth and Fourteenth Amendments to the United States Constitution, codified at 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3).
11. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 13321 (federal question) and § 1343 (civil rights).
12. Declaratory, injunctive and equitable relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.
13. Compensatory and punitive damages are sought pursuant to 42 U.S.C. § 1983 and § 1985.
14. Costs and attorney's fees may be awarded pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. Rule 54.

15. As mandated by the Supremacy Clause, in relation to actions brought pursuant to 42 U.S.C. § 1983, plaintiffs do not have to comply with Municipal Law Section 50-e with regard to filing a Notice of Claim with regard to federal causes of action.

VENUE

16. This action properly lies in the Western District of New York, pursuant to 28 U.S.C. § 1343(3) because the claims arose in this judicial district and the defendants reside in and/or do business in Monroe County.

1. Factual Background

17. On October 11, 2006, at approximately 7:30, Sherry Carroll and her son Devan White were lying in bed watching television.
18. David Carroll was in a room in the back of the house playing on the computer and petting his dog "Damian," who was asleep.
19. While settling in for the night they heard a loud crashing noise in the front of the house and witnessed many flashlights.
20. The crash that Plaintiffs heard was the sound of the above captioned individual defendants entering the Carroll premises pursuant to a duly executed search warrant.

21. Plaintiffs then heard “get down on the floor, put your hands up, everybody on the floor.”
22. David Carroll was startled, as was Damian, who awoke when he jumped up from the crashing noise.
23. David Carroll started walking out to the front of the house with Damian following him when he recognized the people breaking into the house were police officers.
24. David Carroll then grabbed the collar of his dog and walked into the front of the house where the police were.
25. Sherry Carroll then witnessed her son David Carroll walking towards the front of the house with Damian where above the captioned individual defendants were located.
26. Sherry Carroll noticed that her son David Carroll had a hold of Damian’s collar while walking to the front of the house.

27. When David Carroll and Damian made it to the front of the house Damian started wagging his tail, as he does when company comes over to the house.
28. At no time was Damian growling, attacking, or acting fiercely towards the officers.
29. Deputy James Carroll, of the Monroe County Sheriff's Office, immediately drew his firearm and told the infant David Carroll to leave the room.
30. Upon Deputy Carroll's demand, David Carroll let loose of Damian's collar briefly and turned around to get him again, as he was walking towards the kitchen away from the officers.
31. Just as David Carroll turned around he heard a bang from the discharge of the firearm in the Carroll residence.
32. Sherry Carroll and Devan White also heard an officer holler "get back," and then heard a loud pop and saw a bright flash of light from the front of the home.
33. Deputy James Carroll of the Monroe County Sheriff's Office shot Damian in the head with the infant David Carroll standing only a couple feet away.

34. David Carroll, scared and traumatized, then ran toward the bedroom where Sherry Carroll and Devan White were located yelling “mom, they shot Damian.....they shot our dog.”
35. At this time an unidentified man wearing a black mask entered Sherry Carroll’s bedroom and pushed her face down on the floor.
36. An unidentified officer then pointed a gun at the infant David Carroll and told him to “put his hands up.” David Carroll was very emotional and was afraid of being shot.
37. An unidentified officer then grabbed Sherry Carroll’s left pointer finger and right arm, bending both back to the point of severe pain. The officer then grabbed her right arm and pulled it behind her back and handcuffed her.
38. The officers kept Sherry Carroll, David Carroll, and Devan White in a closed bedroom for approximately 20 minutes.
39. During the time all three (3) Plaintiff’s were locked in the bedroom, they heard the officers making comments such as “she brought this shit on herself,” look at the fucking mess she has to clean up here,” “this bitch had it coming,” “this bitch is a slut.”

40. Two (2) officers then came into Sherry Carroll's bedroom and escorted David Carroll and Devan White to a room in back of the house, and kept Sherry Carroll in the bedroom.
41. An officer with a GRANET wind jacket on kept Sherry Carroll in the bedroom and compelled her to make a statement against her will.
42. The officer making the statement asked Sherry Carroll if she heard the dog growl, to which she replied "no," he then again tried to get Sherry Carroll to state that her dog had growled, and again she stated he had not. The officer then asked her if she had sex with her older sons friends, referring to them as "gang members."
43. During the whole time the officer was making this statement, Sherry Carroll was only asked yes and no questions, was not given any opportunity to make a statement herself, and was coerced, already in a hysterical state after her dog was shot in her home, into signing whatever statement the officer had written down.
44. During the entirety of the incident, the Plaintiffs heard a lot of commotion going on throughout their house, including glass being broken, and the crashing and banging of furniture upstairs.

45. The police found no drugs pursuant to their duly executed search warrant.
46. That the discharge of a firearm in a house full of children; killing the family dog was plainly an irresponsible action on the behalf of the defendants and constitutes gross negligence.
47. Further, the October 11, 2006 police report, authored by Officer Michael Desain of the Brighton Police Department is totally devoid of any evidence that shooting the dog Damian to death was necessary, i.e. there is *no written evidence* that Damian was feral, was on the loose, running wild, or that he attempted to hurt anyone.
48. Defendants, acting under color of state law, violated Plaintiffs' Fourth and Fourteenth Amendment right against unreasonable searches and seizures in that defendants unreasonably interfered with Plaintiffs Sherry Carroll, David Carroll, and Devan Whites' possessory interest in their dog Damian when he was shot needlessly by defendants while their owner looked on, desirous of retaining custody of their dog Damian.
49. Damian presented no imminent danger, in that he was not acting fiercely, threatening or harassing anyone when he was killed in front of the children who owned him.

50. Non-lethal methods could have been used instead of killing the dog Damian, but were not exhausted.
51. Defendant Deputy Carroll acted unreasonably as judged objectively by the prospective of a reasonable sheriff's deputy, and not the subjective intent of Deputy Carroll.
52. Plaintiffs' interest in being free from such unreasonable searches and seizures unreasonably interfering with their dog outweigh any interest defendants may have to justify the interference with Plaintiffs' property rights in the ownership of their dog Damian.

**FIRST CAUSE OF ACTION FOR VIOLATIONS OF FOURTH AND FOURTEENTH AMENDMENT
AS PER 42 U.S.C. § 1983 AGAINST MONROE COUNTY SHERIFF'S DEPARTMENT
DEPUTY JAMES CARROLL, In His Official and Individual Capacity**

53. Plaintiffs Sherry Carroll, David Carroll, and Devan White repeat and reiterate each and every foregoing allegation of this complaint with full force and effect as if set forth at length in this cause of action.
54. On October 11, 2006, at about 7:30 p.m, defendants came to Plaintiff Sherry Carroll's residence where Plaintiff Sherry Carroll, David Carroll, and Devan White were all present, and came into the residence pursuant to a search warrant. Upon defendant entering the residence, Plaintiff David Carroll, with

his dog Damian following him, came from a back room where he was on the computer to see what the commotion was. Upon learning that it was police enforcement, David Carroll grabbed Damian's collar and proceeded to the front of the house where the officers were located. Upon David Carroll and Damian entering the room Deputy James Carroll of the Monroe County Sheriff's Office drew his firearm. Deputy Carroll yelled for David Carroll to get back and leave the room, David Carroll, at this point being shocked and terrified, let go of Damian's collar. Damian started *walking away from the officers toward the kitchen*. When David Carroll turned around to grab his collar again Deputy Carroll shot and killed Damian for no apparent reason.

55. Defendant Deputy Carroll, acting under color of state law, violated Plaintiffs' Fourth Amendment right against unreasonable searches and seizures in that defendants unreasonably interfered with Plaintiffs' possessory interest in their dog Damian as he was shot by Deputy Carroll while Plaintiffs were on-looking and desirous of retaining custody. Damian presented no imminent danger, in that he was not growling, acting fiercely, or harassing anyone when he was killed. Additionally, non-lethal methods could have been used, and were not exhausted. Defendant James Carroll acted unreasonably, as judged objectively by the perspective of a reasonable officer, and not the subjective intent of the defendants. Plaintiffs' interest in being free from such unreasonable searches and seizures and unreasonably interfering with the possessory interest in their

dog Damian pursuant to the Fourth Amendment clearly outweigh any interest defendants may have to justify the intrusion.

56. The shooting of Damian by the defendant Deputy James Carroll constituted or was brought about because of the grossly negligent act by Officer Carroll in shooting Damian to death, which constitutes an official policy of defendants to shoot and kill dogs under the factual circumstances described herein, while knowing of and fully disregarding the constitutional rights of the Plaintiffs under the 14th Amendment of the United States Constitution.

SECOND CAUSE OF ACTION FOR PLAINTIFFS SHERRY CARROLL, ET AL, FOR VIOLATIONS OF THE FOURTEENTH AMENDMENT AS PER 42 U.S.C. § 1983 AGAINST THE COUNTY OF MONROE, MONROE COUNTY SHERIFF'S OFFICE

57. Plaintiffs Sherry Carroll, David Carroll, and Devan White repeat and reiterate each and every foregoing allegation of this complaint with full force and effect as if set forth at length in this cause of action.
58. On October 11, 2006, at about 7:30 p.m, defendants came to Plaintiff Sherry Carroll's residence where Plaintiff Sherry Carroll, David Carroll, and Devan White were all present, and came into the residence pursuant to a search warrant. Upon defendant entering the residence, Plaintiff David Carroll, with his dog Damian following him, came from a back room where he was on the computer to see what the commotion was. Upon learning that it was police enforcement, David Carroll grabbed Damian's collar and proceeded to the front

of the house where the officers were located. Upon David Carroll and Damian entering the room Deputy James Carroll of the Monroe County Sheriff's Office drew his firearm. Deputy Carroll yelled for David Carroll to get back and leave the room, David Carroll, at this point being shocked and terrified, let go of Damian's collar. Damian started *walking away from the officers toward the kitchen*. When David Carroll turned around to grab his collar again Deputy Carroll shot and killed Damian for no apparent reason.

59. Defendant Deputy Carroll, acting under color of state law, violated Plaintiffs' Fourth Amendment right against unreasonable searches and seizures in that defendants unreasonably interfered with Plaintiffs' possessory interest in their dog Damian as he was shot by Deputy Carroll while Plaintiffs were on-looking and desirous of retaining custody. Damian presented no imminent danger, in that he was not growling, acting fiercely, or harassing anyone when he was killed. Additionally, non-lethal methods could have been used, and were not exhausted. Defendant James Carroll acted unreasonably, as judged objectively by the prospective of a reasonable officer, and not the subjective intent of the defendants. Plaintiffs' interest in being free from such unreasonable searches and seizures and unreasonably interfering with the possessory interest in their dog Damian pursuant to the Fourth Amendment clearly outweigh any interest defendants may have to justify the intrusion.

60. The County of Monroe caused Plaintiffs to be subjected to Fourth Amendment violations because Deputy Carroll's actions were part of the customary practices of the County of Monroe, Monroe County Sheriff's department. Such repeated Fourth & Fourteenth Amendment violations amount to the County of Monroe's deliberate indifference to an obvious need for training of its officers, including and especially, Deputy Carroll. This failure to adequately train resulted in Deputy Carroll's actions that caused the Plaintiffs harm, and will continue to do so if nothing is done by the Monroe County Sheriff's Department.
61. That the aforementioned misuse of authority and power by defendant Deputy Carroll was egregious and shocking to the conscience. As a direct result, plaintiff was caused to undergo the humiliation and indignities resulting from being compelled to engage in the physical contact and unlawful confinement described, against her will; and was caused and will continue to undergo and endure severe mental anguish, humiliation and economic hardship as a consequence thereof.
62. Such deprivations were in violation of the rights secured to Plaintiffs by the Fourth and Fourteenth Amendments of the United States Constitution and by Title 42 U.S.C. § 1983.

63. As a result of defendant Deputy Carroll's deprivation of Plaintiffs' civil rights, Plaintiff has been damaged in an amount to be determined at trial.
64. That Plaintiffs demands costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

THIRD CAUSE OF ACTION FOR PLAINTIFFS SHERRY CARROLL, ET AL, FOR VIOLATIONS OF THE FOURTEENTH AMENDMENT AS PER 42 U.S.C. § 1983 AGAINST MONROE COUNTY, MONROE COUNTY SHERIFF'S OFFICE, DEPUTY JAMES CARROLL, In His Official and Individual Capacity, GRANATE, OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity

65. Plaintiffs repeat the allegations contained in the above stated paragraphs of the Complaint as if fully set forth herein in this cause of action..
66. In engaging in the conduct described, by using excessive force against Plaintiff Sherry Carroll to effectuate the above stated search warrant, defendants and each of them deprived plaintiff of her civil rights pursuant to 42 U.S.C. § 1983. Further, as police officers employed by defendants County of Monroe and GRANET, defendants, and each of them, were acting under the color of State law.
67. That the aforementioned misuse of authority and power by defendants was egregious and shocking to the conscience. As a direct result, Plaintiff was caused to undergo the humiliation and indignities resulting from being compelled to engage in the unnecessary and unwanted physical contact with defendants against her will; was compelled to give a statement against her

own interests; will and was caused, and will continue to undergo and endure severe mental anguish, humiliation and economic hardship as a consequence thereof.

68. Such deprivations were in violation of the rights secured to plaintiff by the Fourth and Fourteenth Amendments of the United States Constitution and by 42 U.S.C § 1983.

69. As a result of defendant deprivation of Plaintiff's civil rights, Plaintiff has been damaged in an amount to be determined at trial.

70. That plaintiffs demand costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

FOURTH CAUSE OF ACTION FOR PLAINTIFF DAVID CARROLL FOR VIOLATIONS OF THE FOURTEENTH AMENDMENT AS PER 42 U.S.C. § 1983 AGAINST MONROE COUNTY, MONROE COUNTY SHERIFF'S OFFICE, DEPUTY CARROLL, In His Official and Individual Capacity, GRANATE, OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity

71. Plaintiffs repeat the allegations contained in the above stated paragraphs of the Complaint as if fully set forth herein in this cause of action..

72. In engaging in the conduct described, by using excessive force against Plaintiff David Carroll to effectuate the above stated search warrant, defendants and each of them deprived plaintiff of her civil rights pursuant to 42 U.S.C. § 1983. Further, as police officers defendants DEPUTY JAMES CARROLL, OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity County of Monroe and GRANET, defendants, and each of them, were acting under the color of State law.
73. That the aforementioned misuse of authority and power by defendants was egregious and shocking to the conscience. As a direct result, the infant Plaintiff David Carroll was caused to undergo the humiliation and indignities resulting from being compelled to engage in the unnecessary and unwanted physical contact with defendants against his will in having a gun pointed at his head and for having to witness his dog be shot in front of him; and was caused, and will continue to undergo and endure severe mental anguish, humiliation and economic hardship as a consequence thereof.
74. Such deprivations were in violation of the rights secured to plaintiff by the Fourth and Fourteenth Amendments of the United States Constitution and by 42 U.S.C § 1983.

75. As a result of defendant deprivation of Plaintiff's civil rights, Plaintiff has been damaged in an amount to be determined at trial.

76. That plaintiffs demand costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

PUNITIVE DAMAGES AGAINST DEFENDANT DEPUTY CARROLL, In His Official and Individual Capacity, OFFICER MICHAEL R. DESAIN, In His Official and Individual Capacity; SGT. ROBERT THROWBRIDGE, In His Official and Individual Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity

77. Plaintiffs incorporate herein by reference all of the allegations set forth herein in this Complaint as if fully set forth herein.

78. Defendants Deputy Carroll, In His Individual and Official Capacity, OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity were deliberately indifferent to Plaintiff Carrolls' constitutional rights as a result of his indifference and malice by shooting the dog Damian in front of children in a private residence.

79. Punitive damages are justified against the above stated defendants for their deliberate indifference and malice towards the Plaintiffs herein.

WHEREFORE, Plaintiffs demand judgment on the above counts against defendants, their units, their officers, employees, agents, and other persons acting in concert or participation with them as stated above, and award the following amounts:

- A. Compensatory damages in favor of Plaintiffs in an amount to be determined by a jury;
- B. Exemplary damages in favor of each Plaintiff;
- C. Costs of this action, including reasonable attorney fees to the Plaintiff Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, U.S.C. § 1988 (1976); and
- D. Such other and further relief as the court may deem appropriate.

Dated: Rochester, New York
February 28, 2007

/s/Christina A. Agola , Esq.
Law Office of Christina A. Agola
Attorney for Plaintiffs
28 East Main Street
730 First Federal Plaza
Rochester, New York 14614
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRY CARROLL, Individually and as Natural Parent & Legal
Guardian on Behalf of DAVID CARROLL & DEVAN WHITE, Both
Infants Under the Age of Eighteen (18);

PROPOSED AMENDED
COMPLAINT

Plaintiffs,

-vs-

Civ. No.: 07-cv-6123 CJS (P)

COUNTY OF MONROE, MONROE COUNTY SHERIFF'S
DEPARTMENT, PATRICK O'FLYNN, SHERIFF OF THE
MONROE COUNTY'S SHERIFF DEPARTMENT, In His Official
Capacity DEPUTY SHERIFF JAMES CARROLL, In His Official and
Individual Capacity, OFFICER MICHAEL R. DESAIN, In His
Official and Individual Capacity; SGT. ROBERT THROWBRIDGE, In
His Official and Individual Capacity; SGT. JOHN HENDERSEN, In
His Official and Individual Capacity, CHIEF MERRIT RAHN, In His
Official and Individual Capacity; TOWN OF BRIGHTON; TOWN OF
BRIGHTON POLICE DEPARTMENT; TOWN OF GREECE; TOWN
OF GREECE POLICE DEPARTMENT; DEPUTY MIKE HOGAN, In
His Official and Individual Capacities; OFFICER JOSEPH HOPPER,
In His Official and Individual Capacities; OFFICER JOSE CELORIO,
In His Official and Individual Capacities; LIEUTENANT STEVE
CHATTERTON, In His Official and Individual Capacities; OFFICER
GARY PIGNATO, In His Official and Individual Capacities;
OFFICER DAVID ROBBINS, In His Official and Individual
Capacities; OFFICER ANTHONY WALTARMYER, In His Official
and Individual Capacities,

Defendants.

JURY DEMAND

Trial by jury on all issues is demanded.

PRELIMINARY INTRODUCTION

1. This is an action brought pursuant to 42 U.S.C. § 1983 and the Fourth Amendment of the United States Constitution for the interference with the Plaintiffs' property rights, i.e. the ownership of their dogs, pursuant to the Fourth Amendment and for the use of excessive force in violation of the Fourteenth Amendment.

PARTIES

2. Plaintiff Sherry Carroll resides at 284 Ridgedale Circle, Rochester, New York 14616 which is located in the County of Monroe, State of New York.
3. Plaintiff David Carroll, by and through his natural parent and legal guardian Sherry Carroll, resides at 284 Ridgedale Circle, Rochester, New York 14616, which is located in the County of Monroe, State of New York.
4. Plaintiff Devan White, by and through his natural parent and legal guardian Sherry Carroll, resides at 284 Ridgedale Circle, Rochester, New York 14616, which is located in the County of Monroe, State of New York.
5. Upon information and belief, the Monroe County Sheriff's Department operates under the direct control of Monroe County, State of New York.
6. Defendant Patrick Flynn is the Sheriff of The Monroe County Sheriff's Department.
7. Defendant Deputy Sheriff James Carroll is a Deputy Sheriff hired and supervised by the County of Monroe.
8. Defendants TOWN OF GREECE and TOWN OF BRIGHTON are municipal

corporations organized and operating under the laws of the State of New York, with their locations being in Monroe County, State of New York.

9. TOWN OF GREECE POLICE DEPARTMENT and TOWN OF BRIGHTON POLICE DEPARTMENT are departments of defendants TOWN OF GREECE and TOWN OF BRIGHTON, which are municipal corporations organized and operated under the laws fo the State of New York, and located in the County of Monroe, State of New York.

10. CHIEF MERRIT RAHN, is an individual who, upon information and belief, resides in the County of Monroe, State of New York, and is the highest ranking police officer [Chief] for the Town of Greece Police Department.

11. Defendants OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity, DEPUTY MIKE HOGAN, In His Official and Individual Capacity, OFFICER JOSEPH HOPPER, In His Official and Individual Capacity, OFFICER JOSE CELORIO, In His Official and Individual Capacity, LIEUTENANT STEVE CHATTERTON, In His Official and Individual Capacity, OFFICER GARY PIGNATO, In His Official and Individual Capacity; OFFICER DAVE ROBBINS, In His Official and Individual Capacity, OFFICER ANTHONY

WALTARMYER, In His Official and Individual Capacity, are all members of several local police agencies who are also members of GRANET who were present on the evening of October 11, 2006 during the events which form the basis of this Complaint.

JURISDICTION

12. Plaintiffs' bring this action to recover damages for the violation of their civil rights under the Fourth and Fourteenth Amendments to the United States Constitution, codified at 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3).
13. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 13321 (federal question) and § 1343 (civil rights).
14. Declaratory, injunctive and equitable relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.
15. Compensatory and punitive damages are sought pursuant to 42 U.S.C. § 1983 and § 1985.
16. Costs and attorney's fees may be awarded pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. Rule 54.
17. As mandated by the Supremacy Clause, in relation to actions brought pursuant

to 42 U.S.C. § 1983, plaintiffs do not have to comply with Municipal Law Section 50-e with regard to filing a Notice of Claim with regard to federal causes of action.

VENUE

18. This action properly lies in the Western District of New York, pursuant to 28 U.S.C. § 1343(3) because the claims arose in this judicial district and the defendants reside in and/or do business in Monroe County.

1. Factual Background

19. On October 11, 2006, at approximately 7:30, Sherry Carroll and her son Devan White were lying in bed watching television.
20. David Carroll was in a room in the back of the house playing on the computer and petting his dog "Damian," who was asleep.
21. While settling in for the night they heard a loud crashing noise in the front of the house and witnessed many flashlights.
22. The crash that Plaintiffs heard was the sound of the above captioned individual defendants entering the Carroll premises pursuant to a duly executed search warrant.
23. Plaintiffs then heard "get down on the floor, put your hands up, everybody on

the floor.”

24. David Carroll was startled, as was Damian, who awoke when he jumped up from the crashing noise.
25. David Carroll started walking out to the front of the house with Damian following him when he recognized the people breaking into the house were police officers.
26. David Carroll then grabbed the collar of his dog and walked into the front of the house where the police were.
27. Sherry Carroll then witnessed her son David Carroll walking towards the front of the house with Damian where above the captioned individual defendants were located.
28. Sherry Carroll noticed that her son David Carroll had a hold of Damian’s collar while walking to the front of the house.
29. When David Carroll and Damian made it to the front of the house Damian

started wagging his tail, as he does when company comes over to the house.

30. At no time was Damian growling, attacking, or acting fiercely towards the officers.
31. Deputy James Carroll, of the Monroe County Sheriff's Office, immediately drew his firearm and told the infant David Carroll to leave the room.
32. Upon Deputy Carroll's demand, David Carroll let loose of Damian's collar briefly and turned around to get him again, as he was walking towards the kitchen away from the officers.
33. Just as David Carroll turned around he heard a bang from the discharge of the firearm in the Carroll residence.
34. Sherry Carroll and Devan White also heard an officer holler "get back," and then heard a loud pop and saw a bright flash of light from the front of the home.
35. Deputy James Carroll of the Monroe County Sheriff's Office shot Damian in the head with the infant David Carroll standing only a couple feet away.
36. David Carroll, scared and traumatized, then ran toward the bedroom where

Sherry Carroll and Devan White where located yelling “mom, they shot Damian.....they shot our dog.”

37. At this time an unidentified man wearing a black mask entered Sherry Carroll’s bedroom and pushed her face down on the floor.
38. An unidentified officer then pointed a gun at the infant David Carroll and told him to “put his hands up.” David Carroll was very emotional and was afraid of being shot.
39. An unidentified officer then grabbed Sherry Carroll’s left pointer finger and right arm, bending both back to the point of severe pain. The officer then grabbed her right arm and pulled it behind her back and handcuffed her.
40. The officers kept Sherry Carroll, David Carroll, and Devan White in a closed bedroom for approximately 20 minutes.
41. During the time all three (3) Plaintiff’s were locked in the bedroom, they heard the officers making comments such as “she brought this shit on herself,” look at the fucking mess she has to clean up here,” “this bitch had it coming,” “this bitch is a slut.”

42. Two (2) officers then came into Sherry Carroll's bedroom and escorted David Carroll and Devan White to a room in back of the house, and kept Sherry Carroll in the bedroom.
43. An officer with a GRANET wind jacket on kept Sherry Carroll in the bedroom and compelled her to make a statement against her will.
44. The officer making the statement asked Sherry Carroll if she heard the dog growl, to which she replied "no," he then again tried to get Sherry Carroll to state that her dog had growled, and again she stated he had not. The officer then asked her if she had sex with her older sons friends, referring to them as "gang members."
45. During the whole time the officer was making this statement, Sherry Carroll was only asked yes and no questions, was not given any opportunity to make a statement herself, and was coerced, already in a hysterical state after her dog was shot in her home, into signing whatever statement the officer had written down.
46. During the entirety of the incident, the Plaintiffs heard a lot of commotion going on throughout their house, including glass being broken, and the crashing and banging of furniture upstairs.

47. The police found no drugs pursuant to their duly executed search warrant.
48. That the discharge of a firearm in a house full of children; killing the family dog was plainly an irresponsible action on the behalf of the defendants and constitutes gross negligence.
49. Further, the October 11, 2006 police report, authored by Officer Michael Desain of the Brighton Police Department is totally devoid of any evidence that shooting the dog Damian to death was necessary, i.e. there is ***no written evidence*** that Damian was feral, was on the loose, running wild, or that he attempted to hurt anyone.
50. Defendants, acting under color of state law, violated Plaintiffs' Fourth and Fourteenth Amendment right against unreasonable searches and seizures in that defendants unreasonably interfered with Plaintiffs Sherry Carroll, David Carroll, and Devan Whites' possessory interest in their dog Damian when he was shot needlessly by defendants while their owner looked on, desirous of retaining custody of their dog Damian.
51. Damian presented no imminent danger, in that he was not acting fiercely, threatening or harassing anyone when he was killed in front of the children who owned him.

52. Non-lethal methods could have been used instead of killing the dog Damian, but were not exhausted.
53. Defendant Deputy Carroll acted unreasonably as judged objectively by the prospective of a reasonable sheriff's deputy, and not the subjective intent of Deputy Carroll.
54. Plaintiffs' interest in being free from such unreasonable searches and seizures unreasonably interfering with their dog outweigh any interest defendants may have to justify the interference with Plaintiffs' property rights in the ownership of their dog Damian.

**FIRST CAUSE OF ACTION FOR VIOLATIONS OF FOURTH AND FOURTEENTH AMENDMENT
AS PER 42 U.S.C. § 1983 AGAINST ALL DEFENDANTS**

55. Plaintiffs Sherry Carroll, David Carroll, and Devan White repeat and reiterate each and every foregoing allegation of this complaint with full force and effect as if set forth at length in this cause of action.
56. On October 11, 2006, at about 7:30 p.m, defendants came to Plaintiff Sherry Carroll's residence where Plaintiff Sherry Carroll, David Carroll, and Devan White were all present, and came into the residence pursuant to a search warrant. Upon defendant entering the residence, Plaintiff David Carroll, with his dog Damian following him, came from a back room where he was on the

computer to see what the commotion was. Upon learning that it was police enforcement, David Carroll grabbed Damian's collar and proceeded to the front of the house where the officers were located. Upon David Carroll and Damian entering the room Deputy James Carroll of the Monroe County Sheriff's Office drew his firearm. Deputy Carroll yelled for David Carroll to get back and leave the room, David Carroll, at this point being shocked and terrified, let go of Damian's collar. Damian started *walking away from the officers toward the kitchen*. When David Carroll turned around to grab his collar again Deputy Carroll shot and killed Damian for no apparent reason.

57. Defendants, acting under color of state law, violated Plaintiffs' Fourth Amendment right against unreasonable searches and seizures in that defendants unreasonably interfered with Plaintiffs' possessory interest in their dog Damian as he was shot by Deputy Carroll while Plaintiffs were on-looking and desirous of retaining custody. Damian presented no imminent danger, in that he was not growling, acting fiercely, or harassing anyone when he was killed. Additionally, non-lethal methods could have been used, and were not exhausted. Defendant James Carroll acted unreasonably, as judged objectively by the prospective of a reasonable officer, and not the subjective intent of the defendants. Plaintiffs' interest in being free from such unreasonable searches and seizures and unreasonably interfering with the possessory interest in their dog Damian pursuant to the Fourth Amendment clearly outweigh any interest

defendants may have to justify the intrusion.

58. The shooting of Damian by the defendant Deputy James Carroll constituted or was brought about because of the grossly negligent act by Officer Carroll in shooting Damian to death, which constitutes an official policy of defendants to shoot and kill dogs under the factual circumstances described herein, while knowing of and fully disregarding the constitutional rights of the Plaintiffs under the 14th Amendment of the United States Constitution.

SECOND CAUSE OF ACTION FOR PLAINTIFFS SHERRY CARROLL, ET AL, FOR VIOLATIONS OF THE FOURTEENTH AMENDMENT AS PER 42 U.S.C. § 1983 AGAINST ALL DEFENDANTS

59. Plaintiffs Sherry Carroll, David Carroll, and Devan White repeat and reiterate each and every foregoing allegation of this complaint with full force and effect as if set forth at length in this cause of action.
60. On October 11, 2006, at about 7:30 p.m, defendants came to Plaintiff Sherry Carroll's residence where Plaintiff Sherry Carroll, David Carroll, and Devan White were all present, and came into the residence pursuant to a search warrant. Upon defendant entering the residence, Plaintiff David Carroll, with his dog Damian following him, came from a back room where he was on the computer to see what the commotion was. Upon learning that it was police enforcement, David Carroll grabbed Damian's collar and proceeded to the front of the house where the officers were located. Upon David Carroll and Damian entering the room Deputy James Carroll of the Monroe County Sheriff's Office

drew his firearm. Deputy Carroll yelled for David Carroll to get back and leave the room, David Carroll, at this point being shocked and terrified, let go of Damian's collar. Damian started *walking away from the officers toward the kitchen*. When David Carroll turned around to grab his collar again Deputy Carroll shot and killed Damian for no apparent reason.

61. Defendant Deputy Carroll, acting under color of state law, violated Plaintiffs' Fourth Amendment right against unreasonable searches and seizures in that defendants unreasonably interfered with Plaintiffs' possessory interest in their dog Damian as he was shot by Deputy Carroll while Plaintiffs were on-looking and desirous of retaining custody. Damian presented no imminent danger, in that he was not growling, acting fiercely, or harassing anyone when he was killed. Additionally, non-lethal methods could have been used, and were not exhausted. Defendant James Carroll acted unreasonably, as judged objectively by the perspective of a reasonable officer, and not the subjective intent of the defendants. Plaintiffs' interest in being free from such unreasonable searches and seizures and unreasonably interfering with the possessory interest in their dog Damian pursuant to the Fourth Amendment clearly outweigh any interest defendants may have to justify the intrusion.
62. The County of Monroe caused Plaintiffs to be subjected to Fourth Amendment violations because Deputy Carroll's actions were part of the customary

practices of the County of Monroe, Monroe County Sheriff's department. Such repeated Fourth & Fourteenth Amendment violations amount to the County of Monroe's deliberate indifference to an obvious need for training of its officers, including and especially, Deputy Carroll. This failure to adequately train resulted in Deputy Carroll's actions that caused the Plaintiffs harm, and will continue to do so if nothing is done by the Monroe County Sheriff's Department.

63. That the aforementioned misuse of authority and power by defendant Deputy Carroll was egregious and shocking to the conscience. As a direct result, plaintiff was caused to undergo the humiliation and indignities resulting from being compelled to engage in the physical contact and unlawful confinement described, against her will; and was caused and will continue to undergo and endure severe mental anguish, humiliation and economic hardship as a consequence thereof.
64. Such deprivations were in violation of the rights secured to Plaintiffs by the Fourth and Fourteenth Amendments of the United States Constitution and by Title 42 U.S.C. § 1983.
65. As a result of defendant Deputy Carroll's deprivation of Plaintiffs' civil rights, Plaintiff has been damaged in an amount to be determined at trial.

66. That Plaintiffs demands costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

**THIRD CAUSE OF ACTION FOR PLAINTIFFS SHERRY CARROLL, ET AL, FOR VIOLATIONS OF
THE FOURTEENTH AMENDMENT AS PER 42 U.S.C. § 1983 AGAINST ALL DEFENDANTS**

67. Plaintiffs repeat the allegations contained in the above stated paragraphs of the Complaint as if fully set forth herein in this cause of action..

68. In engaging in the conduct described, by using excessive force against Plaintiff Sherry Carroll to effectuate the above stated search warrant, defendants and each of them deprived plaintiff of her civil rights pursuant to 42 U.S.C. § 1983. Further, as police officers employed by defendants County of Monroe and GRANET, defendants, and each of them, were acting under the color of State law.

69. That the aforementioned misuse of authority and power by defendants was egregious and shocking to the conscience. As a direct result, Plaintiff was caused to undergo the humiliation and indignities resulting from being compelled to engage in the unnecessary and unwanted physical contact with defendants against her will; was compelled to give a statement against her own interests; will and was caused, and will continue to undergo and endure severe mental anguish, humiliation and economic hardship as a consequence thereof.

70. Such deprivations were in violation of the rights secured to plaintiff by the Fourth and Fourteenth Amendments of the United States Constitution and by 42 U.S.C § 1983.

71. As a result of defendant deprivation of Plaintiff's civil rights, Plaintiff has been damaged in an amount to be determined at trial.

72. That plaintiffs demand costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

**FOURTH CAUSE OF ACTION FOR PLAINTIFF DAVID CARROLL FOR VIOLATIONS OF THE
FOURTEENTH AMENDMENT AS PER 42 U.S.C. § 1983 AGAINST ALL DEFENDANTS**

73. Plaintiffs repeat the allegations contained in the above stated paragraphs of the Complaint as if fully set forth herein in this cause of action..

74. In engaging in the conduct described, by using excessive force against Plaintiff David Carroll to effectuate the above stated search warrant, defendants and each of them deprived plaintiff of her civil rights pursuant to 42 U.S.C. § 1983. Further, as police officers defendants DEPUTY JAMES CARROLL, OFFICER MICHAEL R.

DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity County of Monroe and GRANET, defendants, and each of them, were acting under the color of State law.

75. That the aforementioned misuse of authority and power by defendants was egregious and shocking to the conscience. As a direct result, the infant Plaintiff David Carroll was caused to undergo the humiliation and indignities resulting from being compelled to engage in the unnecessary and unwanted physical contact with defendants against his will in having a gun pointed at his head and for having to witness his dog be shot in front of him; and was caused, and will continue to undergo and endure severe mental anguish, humiliation and economic hardship as a consequence thereof.
76. Such deprivations were in violation of the rights secured to plaintiff by the Fourth and Fourteenth Amendments of the United States Constitution and by 42 U.S.C § 1983.
77. As a result of defendant deprivation of Plaintiff's civil rights, Plaintiff has been damaged in an amount to be determined at trial.
78. That plaintiffs demand costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

PUNITIVE DAMAGES AGAINST THE INDIVIDUAL DEFENDANTS

79. Plaintiffs incorporate herein by reference all of the allegations set forth herein in this Complaint as if fully set forth herein.
80. Defendants Deputy Carroll, In His Individual and Official Capacity, OFFICER MICHAEL R. DESAIN, In His Individual and Official Capacity; SGT. ROBERT THROWBRIDGE, In His Individual and Official Capacity; SGT. JOHN HENDERSEN, In His Official and Individual Capacity were deliberately indifferent to Plaintiff Carrolls' constitutional rights as a result of his indifference and malice by shooting the dog Damian in front of children in a private residence.
81. Punitive damages are justified against the above stated defendants for their deliberate indifference and malice towards the Plaintiffs herein.

WHEREFORE, Plaintiffs demand judgment on the above counts against defendants, their units, their officers, employees, agents, and other persons acting in concert or participation with them as stated above, and award the following amounts:

A. Compensatory damages in favor of Plaintiffs in an amount to be determined by a jury;

- B. Exemplary damages in favor of each Plaintiff;
- C. Costs of this action, including reasonable attorney fees to the Plaintiff Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, U.S.C. § 1988 (1976); and
- D. Such other and further relief as the court may deem appropriate.

Dated: Rochester, New York
February 28, 2007

/s/Christina A. Agola, Esq.
Law Office of Christina A. Agola
Attorney for Plaintiffs
28 East Main Street
730 First Federal Plaza
Rochester, New York 14614
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

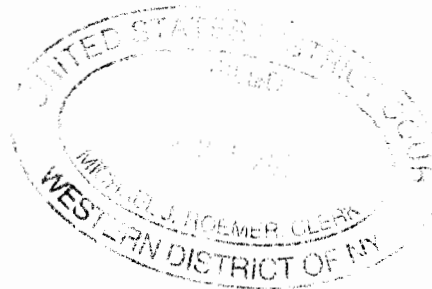
SHERRY CARROLL, as Natural Parent &
Legal Guardian on Behalf of David Carroll,

Plaintiff,

v.

COUNTY OF MONROE and
DEPUTY SHERIFF JAMES CARROLL,
in his Individual Capacity,

Defendants.



SPECIAL VERDICT FORM

07-CV-6123P

In accordance with the Court's instructions, please answer the following questions concerning plaintiff Carroll's three separate causes of action. The answers given for each question must be unanimous.

LIABILITY

**FIRST CAUSE OF ACTION: UNREASONABLE SEIZURE AGAINST
DEFENDANT JAMES CARROLL**

1. Do you find by a preponderance of the evidence that defendant **James Carroll** violated plaintiff Carroll's constitutional rights by unreasonably shooting the dog?

YES _____

NO ✓ _____

If you answered "yes" to question # 1, please proceed to question #2. If you answered "no" to Question #1, you are now finished. Please report your verdict to the Court.

SECOND CAUSE OF ACTION: UNCONSTITUTIONAL POLICY OR
CUSTOM AGAINST DEFENDANT COUNTY OF MONROE

2. Do you find by a preponderance of the evidence that defendant **County of Monroe** violated plaintiff Carroll's constitutional rights by maintaining an unconstitutional policy or custom concerning use of force against animals in the execution of no-knock search warrants?

YES _____

NO _____

Please proceed to question #3.

THIRD CAUSE OF ACTION: INADEQUATE TRAINING AGAINST
DEFENDANT COUNTY OF MONROE

3. Do you find by a preponderance of the evidence that defendant **County of Monroe** violated plaintiff Carroll's constitutional rights by failing to adequately train its Sheriff's Department Deputies concerning use of force against animals in the execution of no-knock search warrants?

YES _____

NO _____

Please proceed to question #4.

COMPENSATORY DAMAGES

4. Did plaintiff Carroll suffer any compensatory damages that were proximately caused by the violation of his constitutional rights as you determined in questions #1, #2 and/or #3?

YES _____

NO _____

If you answered "yes" to question #4, please proceed to question #5. If you answered "no" to question #4, please proceed to question #6.

5. What dollar amount of compensatory damages did plaintiff Carroll suffer as a result of the violation of his constitutional rights as you determined in questions #1, #2 and/or #3?

\$ _____

If you answered "yes" to question #4 and awarded compensatory damages, please proceed to question #7. If you answered "no" to question #4, you should not answer question #5; please proceed to question #6.

6. If you answered "no" to question #4, you are required to enter an award of nominal damages in the amount of one dollar (\$1.00).

\$ _____

Please proceed to question #7 to consider whether an award of punitive damages is appropriate against defendant James Carroll.

PUNITIVE DAMAGES

7. Based upon the instructions given by the Court, should punitive damages be awarded against defendant **James Carroll** as the result of defendant Carroll's unreasonable shooting of the dog?

YES _____

NO _____

8. Please set forth the amount of punitive damages to be awarded against defendant **James Carroll**.

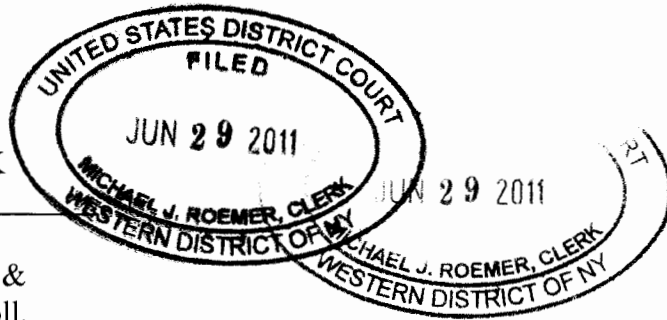
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You are now finished. Please report your verdict to the Court.

Dated: June 28, 2011

Kelly McLaughlin
Foreperson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



SHERRY CARROLL, as Natural Parent &
Legal Guardian on behalf of David Carroll,

Plaintiff,

07-CV-6123P

v.

COUNTY OF MONROE and
DEPUTY SHERIFF JAMES CARROLL,
in his Individual Capacity,

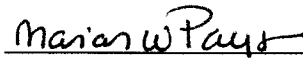
Defendants.

As determined on the record on June 1, 2011 and June 27, 2011 (Docket ## 65, 67), the plaintiff Sherry Carroll's applications to withdraw claims brought by her in her individual capacity and as natural parent and legal guardian on behalf of Devan White, are **GRANTED**. As further determined on the record on June 1, 2011 and June 27, 2011 (Docket ## 65, 67), the claims against defendants Patrick O'Flynn, in his official capacity as the Sheriff of the Monroe County Sheriff's Department, and the Monroe County Sheriff's Department are **DISMISSED**.

In addition, a jury verdict having been entered in favor of defendant Deputy James Carroll (Docket # 69), and the parties having agreed on the record on June 27, 2011, that a finding of liability against defendant Carroll was a predicate to liability against the County of Monroe, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), the plaintiff's claims against the County of Monroe are hereby **DISMISSED**.

Accordingly, the Clerk of the Court is directed to enter judgment in favor of
defendant County of Monroe.

IT IS SO ORDERED.

A handwritten signature in cursive script, reading "Marian W Payson", is written over a horizontal line.

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
June 29, 2011

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

**SHERRY CARROLL, as Natural Parent
& Legal Guardian on behalf of David Carroll,**

Plaintiff(s),

v.

JUDGMENT IN A CIVIL CASE

**COUNTY OF MONROE AND
DEPUTY SHERIFF JAMES CARROLL,
in his Individual Capacity,**

Defendant(s).

CASE NUMBER: 07cv6123P

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment in favor of defendants County of Monroe and Deputy Sheriff James Carroll.

June 30, 2011
Date

MICHAEL J. ROEMER
Clerk of the Court
United States District Court

S/Tricia M. Ofray

Tricia M. Ofray
(By) Deputy Clerk

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I N D E XExaminations Page**PLAINTIFF'S WITNESSES***Denise Sailer*

Direct Examination by Ms. Agola 4

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Redirect Examination by Ms. Agola 11

Sergeant Michael R. DeSain

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Sergeant James Carroll

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Sergeant Scott Walsh

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David Carroll

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Redirect Examination by Mr. Fuller 61

Recross Examination by Ms. Agola 62

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<u>No.</u>	<u>Description</u>	<u>Page</u>
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DEFENDANT'S EXHIBITS

400, 401, 402	Received in evidence	58
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406, 407, 408,	Received in evidence	81
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409		
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1 Denise Sailer ,
2 called herein as a witness, after having first been duly
3 sworn, was examined and testified as follows:

4 THE CLERK: When you are seated, please state your
5 full name and spell your last name for the record.

6 THE WITNESS: Denise Sailer, S-a-i-l-e-r.

7 THE COURT: Good afternoon, Ms. Sailer.

8 THE WITNESS: Good afternoon.

9 THE COURT: Ms. Agola, you may proceed.

10 DIRECT EXAMINATION

11 BY MS. AGOLA:

12 Q. Good afternoon, Ms. Sailer. How are you today?

13 A. Very well. Thank you.

14 Q. Ms. Sailer, where do you currently reside?

15 A. 140 Ava Street in Rochester.

16 Q. And have you always resided at that address?

17 A. No, I have not.

18 Q. Going back to October of 2006, where did you reside?

19 A. 18 Woodside Lane in Greece.

20 Q. Do you have any children?

21 A. Yes, I do, one; a son, he's 20.

22 Q. And do you know the Carroll family?

23 A. I do.

24 Q. For how long did you know the Carroll family?

25 A. Since 1999.

1 Q. How did you come to know them?

2 A. When I moved on to Ridgedale Circle I met them. We're
3 neighbors.

4 Q. How many houses down would you say you were from them?

5 A. Five, maybe six.

6 Q. Did you know their dog Damian?

7 A. Yes, I did.

8 Q. Do you recall what type of breed of dog he was?

9 A. A Bullmastiff.

10 Q. Do you recall when you first met Damian?

11 A. I met Damian shortly after they got him. He was a puppy.

12 Q. Do you recall how tall he was?

13 A. Last time I saw Damian he was probably two and a half,
14 maybe three feet tall.

15 Q. And can you approximate for us how much he weighed?

16 A. About 50 pounds.

17 Q. Was he a tail wagger?

18 A. Yes, he was. Yes.

19 Q. Ms. Sailer, did Damian seem overly protective of the
20 Carroll house?

21 A. No.

22 Q. Did he seem overly protective of the Carroll's?

23 A. No.

24 MR. FULLER: I would object, Your Honor.

25 THE COURT: Sustained as to form.

1 BY MS. AGOLA:

2 Q. Did your children ever play with Damian?

3 A. Yes, all the time.

4 Q. Did you ever have occasion to visit the Carroll
5 residence?

6 A. Yes, I have.

7 Q. And how did Damian act when you knocked on the door?

8 A. He would bark. When the door was open, he would be
9 wagging his tail and anxious to see me.

10 Q. And how did that make you feel?

11 A. Good.

12 MR. FULLER: Objection as to the "anxious to see me".

13 THE COURT: Overruled.

14 BY MS. AGOLA:

15 Q. What would you say the reputation, if any, Damian had in
16 the neighborhood?

17 A. He was a family dog. He had a good reputation. He was a
18 puppy, friendly.

19 Q. Did you have any reason to be fearful of Damian?

20 A. No.

21 Q. Have you ever seen others be fearful around him?

22 A. No.

23 MR. FULLER: Objection.

24 THE COURT: Overruled.

25 BY MS. AGOLA:

1 Q. In the time that you lived in the Carroll neighborhood,
2 did you ever witness Damian act viciously or threatening to
3 anyone?

4 A. Never.

5 Q. Did you ever have any reason to complain about Damian to
6 Animal Control?

7 A. No.

8 Q. Did you ever contact the police regarding Damian?

9 A. No.

10 Q. Would you say that Damian is a gentle dog?

11 A. Yes.

12 Q. Would you say he's a friendly dog?

13 A. Yes.

14 Q. What would you base that opinion on?

15 A. My interaction with him, playing with him, watching him
16 walk throughout the neighborhood. The Carroll family would
17 walk their dog around the circle.

18 Q. Do you remember the last time you saw Damian?

19 A. The last time I saw Damian, he was being walked by the
20 Carroll family. And after that, my son came home and let me
21 know that Damian had been shot.

22 Q. And how did that make you feel?

23 A. Terrible. Damian was --

24 MR. FULLER: Objection.

25 THE COURT: Sustained.

1 BY MS. AGOLA:

2 Q. You said your son came home and told you?

3 A. Yes.

4 Q. Did your son play with Damian?

5 A. Daily.

6 MS. AGOLA: Nothing further.

7 THE COURT: Mr. Fuller?

8 MR. FULLER: Thank you, Judge.

9 CROSS-EXAMINATION

10 BY MR. FULLER:

11 Q. Good afternoon, ma'am.

12 A. Good afternoon.

13 Q. Your name is Denise Sailer, correct?

14 A. Correct.

15 Q. Do you have an ex-husband named Mike?

16 A. Yes, I do.

17 Q. Mike still live in New Jersey?

18 A. Yes.

19 Q. You indicated you lived at 18 Woodside Lane?

20 A. Correct.

21 Q. Approximately how long was that?

22 A. Almost eleven years.

23 Q. Did you ever live on Ridgedale Circle?

24 A. No, I did not.

25 Q. So, that's a different street, correct?

1 A. It is part of the circle, but a different street.

2 Q. And you're friends with the Carroll's?

3 A. I was neighbors with the Carroll's, not -- yes.

4 Q. You're friends with the Carroll's; you went down there,
5 you knew Sherry Carroll?

6 A. Correct.

7 Q. Your son's named Keith, correct?

8 A. Correct.

9 Q. And he played a lot with David Carroll; isn't that true?

10 A. Yes, correct.

11 Q. Were you familiar, then, with the goings on at 284
12 Ridgedale Circle?

13 A. No.

14 Q. Did you hang out there with your son?

15 A. No.

16 Q. Do you allow your son to hang out there?

17 A. Yes.

18 Q. And you indicated that Damian the dog -- and I noticed
19 you hesitated. You said he was a Bullmastiff?

20 A. Correct.

21 Q. Are you sure about that? I mean, are you familiar with
22 dog breeds?

23 A. Absolutely.

24 Q. Okay. And could he have been a Pitbull Mastiff?

25 A. As in a mixed breed?

1 Q. Correct.

2 A. I didn't see pedigree papers, correct.

3 Q. Are you familiar with other dogs the Carroll family
4 owned?

5 A. Somewhat, yes.

6 Q. Goliath, Tia, Right Eye?

7 A. No.

8 Q. You weren't familiar with those?

9 A. No.

10 Q. And is it fair to say you were never a police officer?

11 A. It is fair to say.

12 Q. Is it fair to say that you never had occasion to serve a
13 search warrant?

14 A. Correct.

15 Q. As a matter of fact, a no-knock search warrant, you've
16 never had to do that, correct?

17 A. Correct.

18 Q. Do you harbor any type of ill feelings toward the police?

19 A. No.

20 Q. Now, I'm going to direct your attention to October 11,
21 2006, at approximately 6:45 p.m.. Do you recall where you
22 were?

23 A. No, I do not.

24 Q. Is it fair to say you were not at 284 Ridgedale Circle?

25 A. Correct.

1 Q. It's accurate to say that you were not there when the
2 GRANET officers were serving a court ordered no-knock search
3 warrant; isn't that true?

4 A. Correct.

5 Q. So, you weren't in the house?

6 A. No, I was not.

7 Q. So, you didn't have any observations, whatsoever, with
8 regard to the entry by law enforcement officers, correct?

9 A. Correct.

10 Q. And in all honesty, you can't tell us how Damian was
11 acting toward the police on October 11, 2006, can you?

12 A. Correct.

13 MR. FULLER: No further questions. Thank you, ma'am.

14 REDIRECT EXAMINATION

15 BY MS. AGOLA:

16 Q. Ms. Sailer, prior to October 11th of 2006, had you ever
17 seen the police at the Carroll residence?

18 A. I have.

19 Q. And, you know, incident to those occasions, you still saw
20 Damian, did you not?

21 A. Correct.

22 Q. And after October 11th of 2006, did you see Damian?

23 A. No.

24 MS. AGOLA: Thank you.

25 THE COURT: Any recross?

1 MR. FULLER: No recross, Your Honor. Thank you.

2 THE COURT: Thank you, Ms. Sailer. You may step
3 down. You're excused.

4 Ms. Agola, would you call your next witness?

5 MS. AGOLA: Officer DeSain. Sergeant DeSain.

6 Sergeant Michael R. DeSain ,
7 called herein as a witness, after having first been duly
8 sworn, was examined and testified as follows:

9 THE CLERK: Please be seated. When you are seated,
10 please state your full name and spell your last name for the
11 record.

12 THE WITNESS: My name is Michael R. DeSain. It's
13 D-e-S-a-i-n.

14 THE COURT: Good afternoon, sir.

15 THE WITNESS: Good afternoon, ma'am.

16 DIRECT EXAMINATION

17 BY MS. AGOLA:

18 Q. Good afternoon. Is it Sergeant DeSain?

19 A. Yes, it is.

20 Q. Sergeant DeSain, isn't it true that you were part of the
21 entry team that entered the Carroll residence on October 11th
22 of 2006?

23 A. It is true.

24 Q. And isn't it also true that you were the person who
25 conducted the briefing at the Greece Police station prior to

1 the execution of that warrant?

2 A. Yes, it is true.

3 Q. And is it fair to say that one of the purposes of
4 briefing the entry team is to make them alert as to any
5 potential dangers they might encounter?

6 A. Yes.

7 Q. One of those dangers, in your experience, is it fair to
8 say, would be a dog intent on guarding his home, correct?

9 A. Yes.

10 Q. The Carroll's reside in Greece, do they not?

11 A. They do.

12 Q. And during that briefing at the Greece Police station,
13 isn't it true that the entry team was made aware of the fact
14 that there was a dog at the Carroll residence?

15 A. I don't recall whether they were or not.

16 Q. Okay.

17 MS. AGOLA: Your Honor, the witness does not have an
18 evidence book before him. Can I put this to him?

19 THE COURT: Why don't you take out the exhibit you
20 want to show him, and let Mr. Fuller know what you're showing
21 him. What are you showing him?

22 BY MS. AGOLA:

23 Q. I'm going to be showing you what's been marked as
24 Plaintiff's Exhibit 1. Take a moment to review that, and
25 when you're ready, can you identify the document for me?

1 A. I'm ready.

2 Q. What is that document?

3 A. It's a Greece Police Department Field Interview Form.

4 Q. What would be the purposes of a document like that?

5 A. An officer typically will complete a form such as this
6 for intelligence purposes; to notify other officers or
7 agencies of something they may have encountered involving
8 either a residence or a person.

9 Q. Would they also prepare this form in anticipation of
10 executing a search warrant?

11 A. No.

12 Q. Well, look at the date of the document on the top. What
13 is the date of the document?

14 A. October 8th of 2006.

15 Q. That's about three days before the execution of the
16 Carroll warrant, is it not?

17 A. Yes, it is.

18 Q. And the briefing was held at the Greece Police station,
19 was it not?

20 A. I am not sure if it was at the Greece Police station or
21 at the Public Safety Building downtown. I don't recall where
22 the actual briefing was held.

23 Q. Okay. And if you look down on the narrative, can you
24 read that paragraph for us?

25 MR. FULLER: I'm going to object, Your Honor. That's

1 a document not in evidence.

2 THE COURT: Sustained.

3 MS. AGOLA: Well, Your Honor, at this time I'm going
4 to move to have the document placed into evidence.

5 MR. FULLER: I would object, based on no foundation,
6 hearsay.

7 THE COURT: Sustained.

8 BY MS. AGOLA:

9 Q. Sergeant DeSain, is it your testimony here today that you
10 did not prepare the entry team for the possibility that there
11 might be a dog present?

12 A. That's correct.

13 Q. So, the entry team went in not knowing a danger -- a
14 potential danger?

15 A. Well, as I stated, I don't recall that document. I don't
16 recall any knowledge of a dog prior to entering that
17 residence. If I had that knowledge, I would absolutely have
18 informed our team of that.

19 Q. Okay. And what would you have informed the team to do?

20 MR. FULLER: Objection; speculation.

21 THE COURT: Overruled.

22 THE WITNESS: Be careful, there's a dog at the
23 residence. That's what I would have informed them.

24 BY MS. AGOLA:

25 Q. Be careful. What about using non-lethal forms to

1 restrain the dog?

2 A. No.

3 Q. How about pepper spray?

4 A. No.

5 Q. Catch pole?

6 A. No.

7 Q. How about a Bean Bag?

8 A. No.

9 Q. You never discussed any of those things with your
10 officers?

11 A. They were not discussed, no.

12 Q. Are you trained to use non-lethal forms of restraining
13 dogs in the execution of search warrants?

14 A. No.

15 Q. All right. Is it fair to categorize or characterize the
16 policy, or the custom that you're accustomed to, as
17 permitting a deputy to use their best judgment in a split
18 second decision making process to shoot or don't shoot?

19 A. Is that a question?

20 Q. Yes.

21 A. What is the question?

22 Q. The question is, what is -- if you don't train or there
23 is no policy with regard to the use of non-lethal force
24 against a dog, what is the policy?

25 A. Are you talking about knock search warrants or no-knock

1 search warrants?

2 Q. Well, let's deal with a no-knock search warrant.

3 THE COURT: Okay. And I think we need to clarify.

4 Are we talking about the policy of the Town of Brighton,

5 policy of Monroe County, the policy of GRANET?

6 MS. AGOLA: Right.

7 BY MS. AGOLA:

8 Q. And before we get there, isn't it fair to say that there
9 is countywide training with regard to the execution of search
10 warrants?

11 A. That's fair to say.

12 Q. So, there's not a separate policy, but for GRANET, right?

13 A. Correct.

14 Q. And the countywide training with regard to the use of
15 lethal force against animals, how would you characterize
16 that?

17 A. There is no training that would state when to use lethal
18 force against a dog. There is no specific training to
19 address that. If an officer is on a routine alarm at a home
20 and a dog runs out and attempts to attack him, there's
21 nothing in the book that says you will do A, B, C and D,
22 prior to destroying that dog.

23 Each officer who encounters a situation like this
24 uses his abilities as best as he can to try to handle that
25 threat of a dog. If it's running on top of a car to get away

1 from the dog, we would do that. You know, the last thing we
2 want to do is destroy an animal, but when I'm given the job to
3 execute a search warrant that is a no-knock warrant, we don't
4 have that ability. We don't have that ability to use Animal
5 Control, to use a less than lethal type of weapon. If I had
6 that ability, we would have chose to do that. We don't have
7 the time to do that, because our lives are at risk entering
8 that door.

9 If I were able to give a warning to the resident,
10 which would essentially be a knock warrant, then we would use
11 an alternative means. We would have Animal Control by our
12 side with a noose in order to, you know, obtain that dog to
13 prevent it from attacking us. But in this particular case we
14 don't have that option.

15 Q. And you don't have the training?

16 A. Would there be training?

17 Q. Sir, I'm asking you. Is there training?

18 A. No, there's no training.

19 Q. So, it's your testimony here today that there is no
20 training with regard to non-lethal uses to control a dog upon
21 the execution of a search warrant?

22 A. We have training in non-lethal weapons. Do we have
23 training specific to a vicious dog attacking us by using a
24 non-lethal weapon? We know from past precedent and
25 experience there are means that you could use if presented

1 with them, but, no, there's no book or training manual that
2 we would refer to use.

3 Q. And what are the means that you are referring to?

4 A. The means in what situation?

5 Q. Well, you just testified -- and I don't want to put words
6 in your mouth, but you said we're advised of means to
7 implement, but we're not trained in those means.

8 A. Well, the means would be the particular situation you're
9 talking about.

10 Q. All right. Let's talk about a no-knock warrant at the
11 Carroll residence on October 11th of 2006. You previously
12 testified that you had no knowledge there was a dog there,
13 correct?

14 A. Correct.

15 Q. And, so, in essence, what did that permit -- the first
16 person in, what did that permit him to do when he saw the
17 dog?

18 A. Well, first, for the record, with or without knowledge,
19 the end result would have been the same.

20 Q. Why is that?

21 A. There are no other means to handle a vicious dog
22 attacking you on a no-knock search warrant. When you enter a
23 house and a dog takes off after you and is about ready to
24 bite you and slow down the flow of the entry team into the
25 fatal funnel of this home, there is no other means presented,

1 other than to dispatch the dog that's vicious.

2 There are multiple occasions I've been on search
3 warrants with animals where the dog was not dispatched, and
4 that is the ideal way to handle it. However, if the dog
5 decides to attack an officer upon entry, what that does,
6 essentially, it slows down that officer getting through what
7 we in police worked are trained as the fatal funnel. If you
8 stop in that fatal funnel, other officers lives are at risk by
9 the bad guy or the bad person inside the home. They have
10 means to weapons.

11 They don't know we're there. We don't knock and say,
12 hey, you know, GRANET outside, let us in. We breach the door
13 by a court authorized search warrant without them knowing.
14 So, they could be in bed, they could be washing the dishes,
15 there's a ton of things that they could be doing. What
16 happens as a result of that, a vicious dog comes forward and
17 attacks one of our officers, and there's five guys behind him
18 that want to get through that door, and they can't get through
19 it because that officer is dealing with a threat; that threat
20 being a vicious dog.

21 Q. Okay. So, it's fair to say that prior to the entry to
22 the Carroll residence, that you did not formulate a plan to
23 isolate the dog?

24 A. Correct.

25 Q. And isn't it also true that you left the entry team, in

1 effect, with no other option but to shoot the dog if he posed
2 a threat?

3 A. I don't think that's a fair statement.

4 Q. Well, you didn't instruct the team, did you?

5 A. Whether I did or did not instruct the team, there would
6 not have been anything different.

7 Q. Right, because --

8 A. There would not have been -- the third officer in would
9 not have had a noose. The second officer in would not have
10 had a Taser. The bottom line is that officer had a shotgun.
11 He had to deal with the threat.

12 Q. Okay. And when he's got that shotgun, he's got a split
13 second to make a decision, right?

14 A. Yes.

15 Q. Shoot or don't shoot, right?

16 A. Correct.

17 Q. Now, wasn't Deputy Carroll the first man in during the
18 raid?

19 A. Yes.

20 Q. And, again, you did not instruct Deputy Carroll to use
21 any non-lethal means to restrain the dog?

22 A. Correct.

23 Q. And he had -- Deputy Carroll had to make a split second
24 decision, did he not?

25 A. He did.

1 Q. And again, that split second decision was to shoot or not
2 shoot the dog, correct?

3 A. Correct.

4 Q. And he shot him, did he not?

5 A. He did.

6 Q. Isn't it true, sir, that you told Mrs. Carroll -- that
7 you apologized to Mrs. Carroll for shooting the dog, correct?

8 A. Yes.

9 Q. And you also told her you had no choice?

10 A. Correct.

11 MS. AGOLA: Thank you.

12 MR. FULLER: At this time, Your Honor, I'd like to
13 make the witness my own witness.

14 THE COURT: Go ahead.

15 MR. FULLER: Thank you.

16 DIRECT EXAMINATION

17 BY MR. FULLER:

18 Q. Good afternoon, sir.

19 A. Good afternoon.

20 Q. We will start at the beginning and get some information
21 on you. Can you tell us how old you are?

22 A. Forty-two.

23 Q. And your marital status?

24 A. I am married with two children.

25 Q. And what are their ages?

1 A. My daughter just turned eleven, and my son is eight, soon
2 to be nine.

3 Q. Do you have any pets at home?

4 A. I do.

5 Q. What are they?

6 A. I currently have a 24-pound cat and a guinea pig.

7 Q. And did you ever own a dog?

8 A. I did.

9 Q. What happened to your dog?

10 A. My dog died at the age of 14.

11 Q. And what type was it?

12 A. It was a Sheltie that my wife got as a gift for
13 graduation.

14 Q. Now, can you tell us where you are currently employed and
15 in what capacity?

16 A. I'm currently in the Town of Brighton Police Department.
17 I'm a Sergeant in charge of the Third Platoon.

18 Q. And how long have you been with the Town of Brighton as a
19 police officer?

20 A. Fifteen years.

21 Q. Prior to becoming a police officer with the Town of
22 Brighton, where were you employed?

23 A. I was a Village of Lyons police officer in Wayne County,
24 from September of 1992 to April of '96.

25 Q. And where were you employed prior to serving as a police

1 officer for the Village of Lyons?

2 A. I was in the United States Navy.

3 Q. And what did you do as a member of the U.S. Navy?

4 A. I was a gunners mate.

5 Q. Did you attend any college?

6 A. I attended college schools, but, no, I do not have a
7 degree.

8 Q. Did you attend school through the U.S. Navy?

9 A. Yes.

10 Q. Now, can you tell the jury about your training, as far
11 as, for instance, did you attend the police academy?

12 A. I did.

13 Q. What's some of the training that you had?

14 A. The use of firearms, the use of non-lethal equipment,
15 tactical proceedings, knowledge of Penal Law and Vehicle &
16 Traffic Law. Basically how to conduct yourself as a police
17 officer.

18 Q. All right. And, in addition, did you have criminal
19 investigation training?

20 A. I did.

21 Q. DWI training?

22 A. I did.

23 Q. Now, did your -- have you had training regarding
24 execution of search warrants?

25 A. I have.

1 Q. And was that in tactical warrant school?

2 A. That was one of them, yeah.

3 Q. What was the other one?

4 A. Various in-service training that are sponsored through
5 Monroe County that multiple agencies usually attend together.

6 Q. And could you explain what tactical warrant school was?

7 A. Tactical warrant school, I believe, it's a two-week
8 school that focuses on entries into homes and businesses, how
9 to clear businesses and homes, the proper way to execute
10 search warrants.

11 Q. Have you executed search warrants in the past?

12 A. I have.

13 Q. Approximately how many?

14 A. Several hundred.

15 Q. And you were asked about a no-knock search warrant. Can
16 you explain to the jury what that is and what the need is for
17 it?

18 A. Sure. A no-knock search warrant is authorized by the
19 judge. We request it, and the reason we request it is for
20 the element of surprise. So, when you enter a home, the
21 residents or occupants there, they don't have time to react
22 to destroy evidence.

23 Q. And are you familiar with GRANET?

24 A. I am.

25 Q. Did you become a GRANET member?

1 A. I did.

2 Q. And can you explain how you became a GRANET member?

3 A. Back in September of 2002, I became a member by applying
4 in my Department and submitting a resume to the command staff
5 with my qualifications.

6 Q. And do you know what agencies make up GRANET?

7 A. There are several agencies. From time to time they may
8 stop participation and start again, depending on their
9 manpower.

10 Q. Would those be agencies within Monroe County?

11 A. Yes.

12 Q. And did you see of any extra training by being a member
13 of GRANET?

14 A. Yes. Once in GRANET we had, like, basically a field
15 training investigator with us that would show us different
16 ways to effectively do the job.

17 Q. Now, you mentioned fatal funnel. Can you define that for
18 the jury, please?

19 A. In these schools that I previously mentioned, we are
20 instructed to remove yourself from the fatal funnel. So, the
21 fatal funnel could be a doorway to a bedroom, a doorway to a
22 home. And the reason for that is, statistically, if officers
23 are killed upon entry or shot, they're shot at the doorway.
24 Because if you're a bad guy inside of a home, and you have
25 access to weapons, you would grab that weapon and immediately

1 shoot toward a door; whether you were shooting towards a
2 person or not, it wouldn't matter. But if you shot toward a
3 door, your chances of hitting somebody on entry would be
4 pretty high. So, our job is to get out of that fatal funnel,
5 and we do so expeditiously and in a certain way every time.

6 Q. Do you generally know how many members are on the GRANET
7 team at any one time searching a home?

8 A. On an entry team?

9 Q. On an entry team, I'm sorry.

10 A. Ideally, five to seven.

11 Q. And do they have different responsibilities?

12 A. They do.

13 Q. What are some of those responsibilities?

14 A. One member I assign shotgun, the next member I assign a
15 halo to -- a halo tool is -- if you think like a fireman, you
16 know, the metal spiked tool with a flat head on one side and
17 a spike on another -- another member I assign to ram tool.
18 The ram tool is the breach mechanism used for the door.

19 Q. Now, I'm going to direct your attention to October 11,
20 2006, and ask you if you were a member of the Greater
21 Rochester Area Narcotics Enforcement Team on that date?

22 A. I was.

23 Q. And does GRANET have jurisdiction over the entire Monroe
24 County?

25 A. Yes.

1 Q. On October 11, 2006, were you given responsibility as a
2 GRANET member to execute a court ordered search warrant on
3 the premises of 284 Ridgedale Circle?

4 A. Yes, I was.

5 Q. Was that in the Town of Greece?

6 A. It is.

7 Q. Now, did you have a specific responsibility on that team;
8 you, yourself?

9 A. I would have been referred to as the team leader. The
10 warrant was my responsibility to execute.

11 Q. And approximately 6:45 on October 11, 2006, at 284
12 Ridgedale Circle, were you the person that had the ram tool?

13 A. I was.

14 Q. Now, could you explain to us how you entered the home?

15 A. Based on the court authorized no-knock entry, we would
16 discreetly enter the property of the residence with staying
17 out of sight, basically, or move quickly to the residence, so
18 nobody can look at you through windows and know that you're
19 coming. Once we were what we call stacked on the door,
20 stacked being members as close as they can to each other to
21 where they are actually touching the leg of the other officer
22 that's in the stack, lines up on the door. They either line
23 up on the left side or the right side of the door. Sometimes
24 in front of the door, if there's no way to conceal yourself.

25 Once everybody's in place, my job, with the ram tool,

1 is to breach the door. The first thing I do is, if there's a
2 storm door, I check and see that it's open, unlocked. The
3 interior door, I check with my hand to see if the handle is
4 locked or unlocked. In this particular case, the storm door
5 was unlocked, the actual door to the residence was locked. If
6 the storm door was locked, hence the halo tool I mentioned
7 earlier, we would use to unlock. Then, I strike the door with
8 the ram tool.

9 Q. And how many times did you have to strike this door?

10 A. Once.

11 Q. Did the door thereafter fly open?

12 A. It did. We're trained to strike a door in a specific
13 area of the door that would cause that door on one strike to
14 open. Because, obviously, if you did it more than once, the
15 people inside the residence have more time to react. And in
16 this particular case, once.

17 Q. And once that door flung open, were you able to make any
18 observations?

19 A. I was.

20 Q. And what were those?

21 A. I saw a dog.

22 Q. And where did you see it?

23 A. It was directly in the entrance to the home -- visible
24 from the entrance -- approaching the front door.

25 Q. And thereafter what did you do?

1 A. Once I rammed the door -- I have a ram tool that's very
2 heavy -- I stepped back to the side of the door and allowed
3 the entry team to go in. I'm the last one in, and I throw
4 the ram tool down and wait. Once I struck the door, Deputy
5 Jim Carroll from the Sheriff's Office entered with shotgun.

6 Q. And who assigned him that position?

7 A. I did.

8 Q. And do you recall the second person that entered?

9 A. I do not.

10 Q. Now, once the door is breached, and after, obviously, the
11 noise, do you say anything?

12 A. The person with the shotgun typically says something. I
13 did not.

14 Q. And what is that?

15 A. "Police. Search warrant." Multiple times.

16 Q. How do they say that?

17 A. "Police. Search warrant. Police. Search warrant.
18 Police. Search warrant."

19 Q. So, are they yelling?

20 A. Yes.

21 Q. Did you hear any dog noises after you breached the door?

22 A. I did.

23 Q. What kind of noises did you hear?

24 A. I heard barking, I heard growling, and I could actually
25 hear the dog approach by the -- you know, like the sound a

1 dog makes as it's coming towards you.

2 Q. And can you tell the jury the purpose of letting Deputy
3 Carroll enter the house first?

4 A. To deal with the threat. The shotgun is the ideal weapon
5 to have, to be the first one into the home.

6 Q. And did there come a time when you heard a gunshot?

7 A. I did.

8 Q. Where were you, if you recall?

9 A. To the side of that front door.

10 Q. And do you know who fired that shot?

11 A. Yes.

12 Q. And who was that?

13 A. Deputy James Carroll.

14 Q. Were you able to actually see him do that from your
15 vantage point?

16 A. Yes.

17 Q. Do you know approximately how far the dog was from Deputy
18 Carroll when he shot it?

19 A. About one foot.

20 Q. And can you tell the jury how the dog was acting when you
21 observed it?

22 A. It was vicious. It was not a friendly dog.

23 Q. In your opinion, and based on your observations, was the
24 dog aggressive?

25 A. Yes.

1 Q. Now, when confronted with a vicious dog while making an
2 entry during a no-knock search warrant, can you ever consider
3 retreating?

4 A. No.

5 Q. And why is that?

6 A. That's not an option. You're authorized and told by the
7 court to go serve this warrant. The means to serve this
8 warrant are to not give notice. So, once you enter that
9 house, a dog is starting to attack and slow down your entry
10 team in that fatal funnel, you can't complete your mission.
11 Your mission is to serve the warrant and find whatever the
12 warrant is directed for you to find. And there was not a
13 retreat. A retreat would mean evidence destruction.

14 Q. Now could you tell the jury differences between the
15 situation where it's necessary to shoot a dog and situations
16 where you didn't have to shoot a dog?

17 A. Absolutely. I've been in both. Many of them.

18 Q. Could you relay some of them to us?

19 A. Sure. Situations where you would not have to shoot a dog
20 would be, hopefully the dog does a 180 and runs into a room
21 where you can secure that room. Several occasions I've
22 encountered dogs, large dogs, small dogs, some known to be
23 mean upon entry. Turns out -- once we enter, you have five
24 to seven officers with black fatigues on running into a home.
25 Most dogs are going to retreat, you would hope. But upon

1 retreating, that dog retreats to a room, and we know that
2 that room is clear -- like a closet or a bedroom -- and we
3 can see that there are no people in that room, simply close
4 the door to the room. Call for an Animal Control. Have
5 Animal Control come with a noose to take the dog out.

6 On other occasions we've -- I've dealt with dogs in
7 stairways where a dog just simply sits there, and we go by the
8 dog, and the dog is no threat to anybody. You could picture
9 the types of dogs I'm talking about, but you would simply walk
10 by the dog and it doesn't attack.

11 And I've been on warrants where the officers have
12 yelled, "dog to the left, dog to the left." The dog there's
13 not attacking, no reason to destroy the dog. You know, I've
14 been on warrants where dogs were destroyed. I've been on
15 warrants where dogs have actually ran out of the home after
16 the entry team upon our arrival. I can give you dozens of
17 scenarios good and bad.

18 MR. FULLER: I have no further questions. Thank you,
19 sir.

20 THE WITNESS: Sure.

21 CROSS-EXAMINATION

22 BY MS. AGOLA:

23 Q. Is it true, sir, that you have no training as to whether
24 a dog is friendly or not?

25 A. I have life experience training.

1 Q. That's not what I asked. I asked you if you have formal
2 training by the County of Monroe.

3 A. I didn't hear the formal part.

4 Q. Let me rephrase the question, then. Do you have formal
5 training by the County of Monroe, countywide training, to
6 assist you in determining whether a dog is friendly or not?

7 A. No.

8 Q. And is it reasonable to believe that a dog might want to
9 protect his home from invasions?

10 A. Absolutely.

11 Q. Now, knowing that, isn't it true that you did not assign
12 any member of the entry team on the night in question,
13 October 11, 2006, with the responsibility of restraining the
14 dog?

15 A. That is true.

16 Q. And, sir, you keep saying that this was a no-knock
17 warrant, and that's why, presumptively, there were no plans;
18 is that correct?

19 A. Yes.

20 Q. If it had been a knock warrant, would that have made a
21 difference?

22 A. Yes.

23 Q. How?

24 A. We knock on the door, we would hear a dog barking inside
25 wanting to protect its property. We would simply call Animal

1 Control. "Animal Control, come down, noose up this dog for
2 us." We have all the time in the world.

3 Q. All right, sir. And what if you had known in advance,
4 prior to a no-knock warrant, that there was a dog on the
5 premises? Is it your testimony here today that you would
6 make no advanced plans?

7 A. Correct.

8 MS. AGOLA: Thank you.

9 THE COURT: Anything else, Mr. Fuller?

10 MR. FULLER: Very briefly.

11 REDIRECT EXAMINATION

12 BY MR. FULLER:

13 Q. Sergeant DeSain, in your experience as a police officer,
14 and more specifically, in your experience with the GRANET
15 team serving no-knock search warrants, have you had occasion
16 to observe dogs?

17 A. Yes.

18 Q. Are you able to tell an aggressive dog from a
19 non-aggressive dog?

20 A. Yes.

21 Q. And is one of the concerns for serving the warrant the
22 safety of yourself, other officers and occupants of the home?

23 A. Yes.

24 Q. And do you also have a concern with retrieving evidence
25 before its destroyed?

1 A. I do.

2 MR. FULLER: I have no further questions. Thank you.

3 MS. AGOLA: Nothing, Judge.

4 THE COURT: All right. Mr. DeSain, you may step
5 down. Thank you very much.

6 THE WITNESS: Thanks.

7 THE COURT: Ms. Agola, please call your next witness.

8 MS. AGOLA: Yes. Sergeant Carroll.

9 Sergeant James Carroll ,
10 called herein as a witness, after having first been duly
11 sworn, was examined and testified as follows:

12 THE CLERK: When you are seated, please state your
13 full name and spell your last name for the record.

14 THE WITNESS: James Carroll, C-a-r-r-o-l-l.

15 THE COURT: You may proceed.

16 DIRECT EXAMINATION

17 BY MS. AGOLA:

18 Q. Good afternoon, Sergeant Carroll.

19 A. Yes, ma'am.

20 Q. And you are a deputy with the Monroe County Sheriff's
21 Department?

22 A. I'm a sergeant.

23 Q. You're a sergeant, excuse me. And isn't it also correct
24 that in October of 2006, you were a member of GRANET?

25 A. Yes, ma'am.

1 Q. And it's also a fact that you attended Tactical Warrant
2 School in Monroe County?

3 A. Yes, ma'am.

4 Q. And that's a countywide training?

5 A. Yes.

6 Q. And you have an obligation to follow county policies, do
7 you not?

8 A. Yes.

9 Q. And is it fair to say, also, that as a member of GRANET,
10 that there are no separate policies with regard to the
11 execution of search warrants?

12 A. I'm sorry; try that one more time, ma'am.

13 Q. Sure. As a member of GRANET, do you have a separate
14 policy book?

15 A. Not that I'm aware of.

16 Q. Sir, do part of the policies that you are referring to
17 mandate that you notify your supervisor if you've used lethal
18 force on an animal?

19 A. Yes.

20 Q. And is it fair also to say that you never received any
21 training involving the identification of a friendly or a
22 non-friendly dog?

23 A. Formal training, no.

24 Q. Have you ever received any formal training on how to
25 isolate a dog upon the execution of a search warrant?

1 A. Other than what I've learned in previous warrants.

2 Q. So, it's fair to say there is no formal training with
3 regard to that?

4 A. I don't believe so.

5 Q. So, you've never been trained perhaps to use pepper spray
6 on a dog?

7 A. I've never heard of an episode where pepper spray worked
8 on a dog.

9 Q. How about a catch pole?

10 A. I've seen Animal Control use one.

11 Q. How about a Taser?

12 A. We didn't have Tasers back in '06.

13 Q. All right. Now, prior to the entry into the Carroll
14 residence back in 2006, you were briefed by Officer DeSain,
15 were you not?

16 A. Yes, ma'am.

17 Q. And isn't it true that you knew there was a dog present
18 at the Carroll residence?

19 A. I believe he did tell me that there was a dog at the
20 location.

21 Q. Is it also correct, Sergeant, that there were no specific
22 plans to isolate any dogs that might have been present at the
23 Carroll residence?

24 A. We don't plan on isolating a dog for no-knock search
25 warrant. Again, like Sergeant DeSain said, if it's a knock

1 warrant, we have time on our side, and that's when we come up
2 with other plans. But a no-knock warrant is specifically
3 designed to get the team in out of the fatal funnel. If the
4 dog chooses to retreat, that gives you more time to figure
5 out how you're going to deal with the dog.

6 Q. And where was the briefing held?

7 A. I believe this one was at the Greece police station on
8 Long Pond, but I'm not positive. I believe it was at the
9 Greece police station, though.

10 Q. So, when you entered the Carroll residence, you had to
11 make a judgment call, did you not?

12 A. Yes, ma'am.

13 Q. And that left you essentially without any option but to
14 kill the Carroll dog, in the event that he attempted to guard
15 his home?

16 A. He was making his way at me in a vicious manner. That's
17 when I chose to dispatch the dog.

18 Q. Well, understood. But the question is, was there any
19 other option?

20 A. The way things were laid out at that time, no, there
21 wasn't.

22 Q. And it was a deliberate choice not to create any
23 alternatives, correct?

24 A. We did not have the time to come up with another way to
25 deal with this.

1 Q. Well, when you say you didn't have the time, you knew in
2 advance, did you not?

3 A. Yes, we did.

4 Q. And isn't it true, sir, that you were the first person
5 through the door after the door was breached?

6 A. Yes, ma'am.

7 Q. And Officer Hopper was behind you?

8 A. He was somewhere behind me. I'm not positive if he was
9 the next man or the man after that, but he was behind me.

10 Q. And upon entering the Carroll residence, you saw the
11 Carroll dog making a fast walking approach towards you?

12 A. Correct.

13 Q. And that wasn't a surprise, was it? You knew the dog was
14 there?

15 A. I knew a dog was there, but I wasn't expecting a fast,
16 aggressive approach at me.

17 Q. Who was behind the dog?

18 A. Nobody at the first point of entry.

19 Q. And when you walked into the living room, was there
20 somebody behind?

21 A. Within a couple seconds, as the dog was making his way
22 down the threshold of the hallway, at one point I did see a
23 large female at the end of the hallway.

24 Q. Do you recall telling her, "dog, dog, dog"?

25 A. I recall saying "dog" to the team.

1 Q. Do you recall telling her, "get your dog, get your dog"?

2 A. I never said that.

3 Q. Do you recall telling Ms. Carroll, "step out of the way"?

4 A. I did.

5 Q. When she stepped out of the way, you shot the dog, right?

6 A. Mrs. Carroll was in no position to be able to capture
7 that dog before the dog got to me.

8 Q. That's not my question. My question is, at that point
9 you made the split second decision to shoot the dog, correct?

10 A. There were things that led up to that point, though,
11 ma'am.

12 Q. I'm asking a question. I am just respectfully requesting
13 that you just answer my question.

14 MR. FULLER: Objection, it's argumentative.

15 THE COURT: Overruled.

16 BY MS. AGOLA:

17 Q. Was there a chance that you could have had Ms. Carroll
18 trap the dog in a room?

19 A. Not at this point, no.

20 Q. Did you plan in advance to perhaps negotiate with the
21 owners to place the dog in a room?

22 A. No, ma'am.

23 Q. You shot the dog one time in the head and he collapsed,
24 correct?

25 A. Yes, ma'am.

1 Q. And where were the children in the house at that point?

2 A. They were in a room, I believe, towards the back of the
3 hallway. I never saw children until we were actually
4 clearing the house.

5 Q. Is it fair to say they heard that gunshot?

6 A. Yes.

7 Q. In that split second, Sergeant, isn't it true that you
8 thought that Damian was a Pitbull?

9 A. I did.

10 Q. Isn't it also true that a month prior to the Carroll
11 entry, that you had shot two Pitbulls in Penfield --

12 A. Correct.

13 Q. -- during a search warrant?

14 A. Yes, ma'am.

15 Q. And they attacked you?

16 A. Yes.

17 Q. So, as that Carroll dog quickly approached you, you felt
18 you had no alternative but to shoot it, correct?

19 A. Not until he was about a foot away from me.

20 Q. Where were you exactly in the living room?

21 A. I want to say I was off to the right. If you come in
22 through the door, there's a hallway directly across. It was
23 a living room, but there was a hallway directly across. Off
24 to the right of the living room, I believe there was a
25 kitchen. I was just right of the hallway between the kitchen

1 and the hallway in the living room.

2 Q. And was the dog headed towards you?

3 A. Yes, ma'am.

4 Q. All right. I want to show you what's previously been
5 marked as Plaintiff's Exhibit 2. I will tell you to take a
6 look at it, and when you're ready, identify it for me.

7 A. I'm ready.

8 Q. Okay. Do you know what that is?

9 A. Yes.

10 Q. What is it?

11 A. I believe his name was Damian, the Bullmastiff at the
12 Carroll house that night.

13 Q. And the photograph that's before you is a picture of?

14 A. After I dispatched it.

15 Q. After you dispatched the dog. Okay.

16 THE COURT: Any objection, Mr. Fuller?

17 MR. FULLER: I made previous objections, Your Honor.
18 I believe they were ruled upon.

19 THE COURT: You may publish it to the jury.

20 BY MS. AGOLA:

21 Q. Now, looking at that photo -- and I think there's a
22 screen right there, sir, for you. Is it your testimony that
23 you were inside of that hallway area here (indicating)?

24 A. I believe that was the doorway to the location. The
25 doorway that we came in through.

1 Q. And you breached the doorway, you walked past the
2 doorway?

3 A. I walked past the doorway, yes.

4 Q. And, so, you were standing to the right of the doorway?

5 A. Yes, ma'am. Probably where that vacuum cleaner is.

6 Q. And you said the dog was running towards you, correct?

7 A. Making a fast approach towards me, yes.

8 Q. What's that room to the side?

9 A. I believe that's a kitchen.

10 Q. Isn't it true that his head is pointed towards the
11 kitchen?

12 A. His head, to me, appears to be towards the vacuum
13 cleaner, where I was standing.

14 Q. Is it possible that that dog was running away from you?

15 A. No, ma'am.

16 Q. He was running right towards you?

17 A. Yes, ma'am.

18 Q. And isn't it true that because there was no plan to deal
19 with the dog that you knew was there, you placed yourself in
20 close proximity with Damian?

21 A. It's a no-knock search warrant, ma'am.

22 Q. And what would you have done differently if it was a
23 knock search warrant regarding plans to deal with the animal?

24 A. We probably would have had Animal Control with us, maybe
25 negotiated with Ms. Carroll to put the dog in a room until we

1 can deal with the problem, but that wasn't -- that's not the
2 way it was.

3 Q. What other non-lethal uses of force would you have used
4 in a knock search warrant, as opposed to a no-knock?

5 A. A knock search warrant, what less lethal would I use?

6 Q. Non-lethal.

7 A. I don't think we would have to go to that if we were
8 talking about a knock. We would be negotiating and planning
9 along. I don't see a need to hurt the animal if it was a
10 knock warrant.

11 Q. And I guess my question to you is, are you trained with
12 regard to the use of non-lethal means of restraining a dog?

13 A. I am. No, I'm sorry, not with the dog.

14 MS. AGOLA: Thank you.

15 THE COURT: Mr. Fuller?

16 MR. FULLER: At this time I'd like to make Sergeant
17 Carroll my witness, Your Honor.

18 THE COURT: Yes.

19 MR. FULLER: Thank you.

20 DIRECT EXAMINATION

21 BY MR. FULLER:

22 Q. Good afternoon, sir.

23 A. Good afternoon.

24 Q. You have the same last name Carroll. Are you related in
25 any way to plaintiff, David Carroll?

1 A. No, sir.

2 Q. Anybody in the family?

3 A. No, sir.

4 Q. Are you married?

5 A. Yes.

6 Q. Do you have any children?

7 A. Two. Two boys.

8 Q. And what are their ages?

9 A. Twelve and nine.

10 Q. And do you have any pets?

11 A. I do.

12 Q. Can you tell the jury what your pets are?

13 A. I have a Bichon Havanese lapdog, and we've just recently
14 acquired my son's grammar school fish for the summer.

15 Q. Did you have any pets before that?

16 A. I did. I had a yellow lab named Mac.

17 Q. What happened to Mac?

18 A. I had to put Mac down after 14 years.

19 Q. Can you tell us what your education is?

20 A. I have a high school diploma, a two-year college degree,
21 and hours of police training.

22 Q. In addition, did you go to FBI school?

23 A. I did. I'm a certified bomb technician from the FBI.

24 Q. Where are you currently employed?

25 A. I'm a Sergeant with the Monroe County Sheriff's Office,

1 road patrol and bomb commander.

2 Q. How long have you been employed with the Monroe County
3 Sheriff's Office?

4 A. Twenty-one years.

5 Q. And how long have you held the rank of Sergeant?

6 A. Four.

7 Q. Four years. And when were you promoted?

8 A. 2007.

9 Q. Now, when you first joined Monroe County Sheriff's
10 Department, where were you assigned?

11 A. I started off as a part-time deputy assigned to the
12 Marine Patrol. After that, I went to Henrietta Knife Patrol.
13 There, I was a uniformed crime scene technician for about
14 ten, eleven years, a field training officer, which means I
15 train the recruits after they come out of the police academy,
16 a background investigator for employment for the Sheriff's
17 Office; I conducted an investigation on your past. I was a
18 drill instructor at the police academy for three years, which
19 means I'm a counselor. My job is to help the recruits find
20 their weak points and help them through it, whether it be
21 physically fit or school, book-wise. And again, I'm the
22 commander of the Sheriff's Bomb Squad.

23 Q. And are you familiar with the Greater Rochester Area
24 Narcotics Enforcement Team?

25 A. I am.

1 Q. And can you tell us some of the members of that team, as
2 far as law enforcement agencies?

3 A. East Rochester used to be in it, Irondequoit, the
4 Sheriff's Department, the City of Rochester, Brighton, and I
5 think that's all that's in it now. And Greece. I'm sorry,
6 Greece Police.

7 Q. How do you become a member of GRANET?

8 A. In my department it's kind of difficult to become a
9 member. You have to have some years of on-the-job, a descent
10 reputation with the department, be able to think on your
11 feet, they go through your internal affairs history, make
12 sure that you're not a problem candidate. They want somebody
13 to represent the Sheriff's Department well. You put a resume
14 together, and then you are selected by your command staff.

15 Q. And were you thereafter selected?

16 A. I was selected, yes.

17 Q. And did you receive any additional training?

18 A. I went to Tactical Warrant School.

19 Q. Now, approximately how long did you serve on GRANET?

20 A. Two years, before I was promoted.

21 Q. Now is GRANET a permanent or temporary assignment?

22 A. Temporary assignment.

23 Q. After GRANET where did you go?

24 A. I was promoted to Sergeant, went to C-zone substation,
25 which is the west side of the County, as a patrol supervisor.

1 After that, after about a year of patrol, I was assigned to
2 the Criminal Investigation section of the Sheriff's
3 Department Warrant Unit.

4 Q. And is that the Fugitive Warrant Unit?

5 A. Fugitive Warrant Unit, yes.

6 Q. In addition to that, what other responsibilities did you
7 have?

8 A. I supervise the sex offenders of the Monroe County area,
9 online cyber crimes, crimes against children on the
10 computers, and the financial economic crimes.

11 Q. Were you involved in any Federal task forces?

12 A. I was. I was Assistant Supervisor to the Fugitive
13 Warrant Task Force with the Marshals Office and Assistant
14 Supervisor with the FBI for the Cyber Crime Task Force.

15 Q. We've obviously sat here and heard the explanation of
16 no-knock warrants. Can you tell us what concerns you have in
17 executing no-knock search warrants?

18 A. No-knock search warrants are very dangerous. We
19 generally get the permission -- you have to get the
20 permission of the judge to get it for a no-knock, and you
21 have to specifically lay out your probable cause to show that
22 there's either going to be danger to the officers entering
23 the location, a sufficient risk of evidence being destroyed
24 in the location. So, they are difficult warrants to get.

25 Q. And have you ever encountered dogs?

1 A. Numerous times.

2 Q. And do you recall what kind of dogs?

3 A. I've encountered everything from a Chocolate Lab to a
4 lapdog, German Shepards, Pitbulls. That's pretty much the
5 range of the dogs I'm used to seeing.

6 Q. Now, when you executed these warrants, did all the dogs
7 you encounter attack?

8 A. No.

9 Q. And can you tell us approximately how many times you've
10 been attacked by a vicious dogs while attempting to comply
11 with a no-knock warrant?

12 A. This was the third time.

13 Q. And were you ever injured as a result of a dog attack
14 while executing a warrant?

15 A. I was.

16 Q. And what were your injuries?

17 A. I have sustained a knee injury while being attacked by
18 two Pitbulls on a warrant in Penfield.

19 Q. And did you have to shoot those Pitbulls?

20 A. I did.

21 Q. And did they survive?

22 A. Both of them survived.

23 Q. I'm going to direct your attention, Sergeant, to October
24 11, 2006. Were you working on the GRANET team at that time?

25 A. I was.

1 Q. And how long had you been on GRANET at that time?

2 A. About a year.

3 Q. Did there come a time where you were notified that a
4 County Court Judge signed a court ordered search warrant for
5 the premises located at 284 Ridgedale Circle?

6 A. I was.

7 Q. Is that in the Town of Greece, County of Monroe?

8 A. It is.

9 Q. And were you on the team that was assigned to enter this
10 premises?

11 A. I was.

12 Q. Do you recall some of the agencies that were
13 participating in that particular entry?

14 A. I do.

15 Q. And who were they?

16 A. Officer DeSain from Brighton, Officer Hopper, Sergeant
17 Trowbridge and Sergeant Henderson from Greece, myself from
18 the Sheriff's Department, and I believe Jose Solario from the
19 Rochester Police Department.

20 Q. In addition to entering the house, is there also a
21 perimeter set up outside?

22 A. Yes.

23 Q. And for what purpose is that done?

24 A. For anybody who wants to run outside of the house and
25 take off on foot.

1 Q. And can you tell the jury what position you were
2 assigned?

3 A. I was assigned to the shotgun; first man through the
4 door.

5 Q. And who assigned you that position?

6 A. Officer DeSain.

7 Q. How were you dressed?

8 A. I was dressed in black fatigues, a flack jacket that said
9 "sheriff" on the back and a sheriff star on the front.

10 Q. When you say flack jacket, is that a bullet resistant or
11 bulletproof vest?

12 A. It's a thicker bulletproof vest.

13 Q. Now, do you remember who was in charge of breaching the
14 door?

15 A. Officer DeSain.

16 Q. Do you remember who was directly behind you?

17 A. I don't. I just know the rest of the team was behind me.

18 Q. Okay. And what was the responsibility of your position?

19 A. My job is to provide security for the team as they are
20 approaching. We are all coming into the house. The shotgun
21 is designed to keep everything in front of you safe, while
22 the team splits up into two and hits hallways or rooms off to
23 the area that you're searching. My job is to make sure that
24 nothing comes and surprises us in the front. I provide
25 security in the hallway and get everybody out of the fatal

1 funnel as fast as possible.

2 Q. Now, did you hear any noises emanating from inside the
3 house after Sergeant DeSain breached the door?

4 A. I did.

5 Q. What were those noises?

6 A. A barking dog. A barking, growling dog.

7 Q. Immediately after the door was breached and you stepped
8 in, what did you observe?

9 A. There was a hallway directly across from the room that I
10 was standing in. It was probably about 20 feet long, maybe
11 25 feet long.

12 Q. Now, when you say across, do you mean in front of you?

13 A. In front of me, a 25 feet long hallway. After being in
14 the house for probably a second, I saw the dog coming around
15 the corner and down the hallway towards me.

16 Q. At that time, when you first saw the dog, did you see
17 anybody else?

18 A. No.

19 Q. Can you describe the way the dog was coming toward you?

20 A. He was coming in -- not a run, but a fast pace, direct
21 movement towards me. He wasn't hesitating. He was showing
22 me his front teeth, and growling, and barking at the same
23 time.

24 Q. And did there come a time when you saw somebody else in
25 the hallway?

1 A. Yes.

2 Q. How many other people did you see?

3 A. One woman.

4 Q. And where was she in relation to the dog?

5 A. She was probably 10-15 feet behind the dog.

6 Q. And can you describe that woman?

7 A. She was a large female, white.

8 Q. Was she adult?

9 A. Yes.

10 Q. Now, after observing the large dog acting in an
11 aggressive manner, what did you do?

12 A. I notified the team, "dog." The dog was still making an
13 approach. As he was getting closer to me, I could realize
14 that he wasn't going to retreat or back off. I lowered my
15 shotgun down on him, again, announced, "dog, dog, dog," at
16 which time I saw the female coming down the hall faster, but
17 she was still quite a ways away from the dog. This wasn't an
18 opportunity where she could grab the dog, because he was
19 right on me. There was a bedroom off to my left -- I'm
20 sorry; a room off to my left in the hallway that I'm talking
21 about. I ordered the woman to get into the hallway. She did
22 comply and at that time I took the shot.

23 Q. Before -- immediately before you took the shot, did you
24 have to do anything?

25 A. I had to get the woman out of the hallway.

1 Q. And did you take the shot straight on or did you move?

2 A. I tilted off to the left -- I'm sorry, my right. I had
3 to lower the shotgun down, because the dog was literally
4 within a foot, if less, to my leg, and I fired in a downward
5 direction for two reasons; I didn't want any of the spray of
6 the shotgun to go down the hallway. I had to make sure my
7 backdrop was clear so nobody else would get hurt.

8 Q. Why did you wait so long before dispatching the dog?

9 A. Because I couldn't get Ms. Carroll out of the hallway.

10 Q. And could you show us or describe the angle of the
11 shotgun?

12 A. It was pointed downward (indicating).

13 Q. So, you are indicating the barrel was downward. The back
14 part of the stock is up?

15 A. The stock is up towards my shoulder and the barrel is
16 probably a foot off my foot.

17 Q. Do you recall where you shot the dog?

18 A. I shot him in, I believe, the eye.

19 Q. How many times did you shoot him?

20 A. Once.

21 Q. What gauge was that shotgun?

22 A. Twelve-gauge tactical buckshot.

23 Q. Why do you use buckshot?

24 A. It's a slower round. It's designed not to go through
25 walls. It's a slow round, so less chance of hurting people

1 with frag or -- frag from the gun.

2 Q. And is buckshot a standard issue for search warrant
3 ammunition?

4 A. Yes.

5 Q. Now, in your opinion, and based on your observations and
6 experience, was the dog acting aggressively when you
7 encountered it?

8 A. Yes.

9 Q. Did you believe that it caused you or other members
10 physical injury, potentially?

11 A. Yes.

12 Q. Now, do you ever have a consideration to stop the warrant
13 team or retreat?

14 A. It's not an option for tactical warrant service. Once
15 you've gained this momentum and you've gained your ground,
16 you can't give it back up. It gives the suspects a chance to
17 arm themselves or destroy evidence that could be in the
18 house.

19 Q. Now, during your years of police service, approximately
20 how many times have you encountered dogs during a search
21 warrant?

22 A. Probably 20 or 30 times.

23 Q. And approximately how many times was it necessary to
24 shoot the dog?

25 A. Three.

1 Q. Can you explain the differences to the jury between times
2 when it was necessary to shoot a dog and times when it
3 wasn't?

4 A. Yes. We've had times where the dog just ran away, which
5 is obviously the best case scenario. We've also negotiated
6 where the owner was able to grab the dog, and we negotiated
7 the dog into a room, a bathroom, somewhere where we can
8 secure the dog until we're done searching the house. We've
9 had dogs just lay right down. I know of one case where a
10 German Shepard ran out through a window and just ran down the
11 street. These were all occasions where, obviously, we didn't
12 feel it was needed to shoot the dog.

13 Q. Would you do anything different if you know there's a dog
14 on the premises versus not knowing there's a dog on the
15 premises?

16 A. On a no-knock warrant there's no difference.

17 Q. And why is that?

18 A. Again, we use the element of surprise to our advantage,
19 whether there's bad armed people in the location or at the
20 risk of destroying evidence.

21 Q. Did you know that there was a vicious dog in the house at
22 284 Ridgedale Circle on October 11, 2006?

23 A. I believe I was briefed that there was a dog.

24 Q. Did you know the dog would be vicious?

25 A. I did not.

1 Q. Did you know that dog would attack you?

2 A. No, I did not.

3 Q. Were you planning on intentionally killing a dog that
4 day?

5 A. Absolutely not.

6 Q. Now, when a firearm is discharged in any situation
7 involving a law enforcement officer in the line of duty, is
8 there some type of investigation?

9 A. Yes.

10 Q. And was there one done in this case?

11 A. There was.

12 Q. And what was the outcome?

13 A. I was cleared of any wrongdoing at the scene.

14 MR. FULLER: At this time, Your Honor, I'm showing
15 the Plaintiff's attorney Defendant's Exhibit No. 400, Defense
16 Exhibit No. 401, Defense Exhibit No. 402. I'd like to enter
17 them into evidence at this time.

18 THE COURT: I believe, Ms. Agola, you have no
19 objection to the admission of 400, 401 or 402?

20 MS. AGOLA: No, I do not.

21 THE COURT: All right. Defense Exhibits 400, 401 and
22 402 are admitted.

23 MR. FULLER: I have no further questions. Thank you,
24 sir.

25 CROSS-EXAMINATION

1 BY MS. AGOLA:

2 Q. Sergeant, if you had known in advance that there was a
3 dog present in a knock search warrant scenario --

4 A. In a knock, ma'am?

5 Q. Yes, in a knock. How would you have planned the entry
6 team?

7 A. On a knock search warrant, we generally have --

8 MR. FULLER: I'm going to object, based on the
9 relevance, Your Honor, and speculation.

10 THE COURT: Overruled. You may answer the question.

11 THE WITNESS: I'm sorry, ma'am. On a knock search
12 warrant what would I have done differently?

13 BY MS. AGOLA:

14 Q. Well, you said here today you have many years of
15 experience, and you've testified that you've been in many
16 execution search warrants and many residences, correct?

17 A. Yes, ma'am.

18 Q. And why don't I break it down this way. How many of
19 those warrants that you've just testified to were knock
20 warrants?

21 A. I don't know.

22 Q. Is it fair to say that you wouldn't know how many are
23 no-knock?

24 A. Correct.

25 Q. So, I guess what I'm having a difficulty understanding is

1 what prohibits you as a police officer from designating
2 someone on the entry team to provide some form of non-lethal
3 means of restraining an animal on a no-knock warrant?

4 A. I don't know who makes the policies for less lethal
5 weapons for a no-knock warrant. GRANET does not use them. I
6 believe that some of the data shows that less lethal devices
7 do not work well on more vicious dogs.

8 Q. So, sir, are you just simply telling me that you're not
9 trained to use non-lethal means of restraining a dog?

10 A. We do not use less lethal means on a vicious dog.

11 Q. And my question was, are you trained to use --

12 A. No.

13 MS. AGOLA: Thank you.

14 THE COURT: Anything else, Mr. Fuller?

15 MR. FULLER: Very briefly.

16 REDIRECT EXAMINATION

17 BY MR. FULLER:

18 Q. Sergeant, are you trained to enter into homes?

19 A. Yes.

20 Q. And are you given training through Monroe County
21 Sheriff's Office?

22 A. Yes.

23 Q. And training through the Greater Rochester Area Narcotics
24 Enforcement Team?

25 A. Yes.

1 Q. And does that involve the use of deadly weapons?

2 A. Yes.

3 Q. And do you have experience in using your discretion with
4 entering homes during search warrants?

5 A. Yes.

6 Q. And approximately how many search warrants did you say
7 you served?

8 A. Probably over 100.

9 MR. FULLER: I have no further questions.

10 RECROSS EXAMINATION

11 BY MS. AGOLA:

12 Q. And you just made reference, sir, to discretion?

13 A. Yes.

14 Q. And isn't that discretion, more or less, the ability in a
15 split-second scenario to make a decision shoot or don't
16 shoot?

17 A. I don't know if you call it discretion, but, yes, you
18 have seconds to make the decision.

19 MS. AGOLA: Thank you.

20 MR. FULLER: One more, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. FULLER:

23 Q. And Sergeant, that discretion or that decision, is that
24 based on your experience as a police officer, police
25 sergeant, a member of GRANET, and the person that served over

1 100 search warrants?

2 A. Yes.

3 Q. Is it also based on your experience and observations of
4 vicious dogs versus non-vicious dogs?

5 A. Correct.

6 Q. And is it also based on your experience of being attacked
7 in the past and injured by a vicious dog?

8 A. Correct.

9 MR. FULLER: Thank you.

10 RECROSS EXAMINATION

11 BY MS. AGOLA:

12 Q. And when we make a distinction between vicious and
13 non-vicious dogs, is it fair to say you received no formal
14 training with regard to how to make that determination?

15 A. Formal, no, but life experience, I think I know what a
16 vicious dog is.

17 Q. I believe you testified to that. My question is, did you
18 receive formal training on how to make a distinguishment
19 between a vicious and a non-vicious dog?

20 MR. FULLER: Objection; asked and answered.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: No, I do not believe I've received
23 training on identifying a vicious dog. Formal training.

24 MS. AGOLA: Thank you.

25 THE COURT: Are you done?

1 MR. FULLER: Yes, Judge.

2 THE COURT: All right. Thank you.

3 THE WITNESS: Thank you, ma'am.

4 MS. AGOLA: I call Sergeant Scott Walsh to the stand.

5 Sergeant Scott Walsh ,

6 called herein as a witness, after having first been duly

7 sworn, was examined and testified as follows:

8 THE CLERK: Please be seated. When you are seated,
9 please state your full name and spell your last name for the
10 record.

11 THE WITNESS: Scott Walsh, W-a-l-s-h.

12 DIRECT EXAMINATION

13 BY MS. AGOLA:

14 Q. Good afternoon. Is it Sergeant?

15 A. Investigator Sergeant.

16 Q. Investigator, okay. So, it's Investigator Walsh?

17 A. Investigator Sergeant.

18 Q. Investigator Sergeant Walsh. Sorry.

19 A. That's okay.

20 Q. How are you this afternoon?

21 A. Good. Thank you.

22 Q. How long have you been with the Sheriff's Department?

23 A. I'm in my twenty-fifth year.

24 Q. And what is your role there?

25 A. Currently, I supervise the Major Crimes Unit, the

1 Technicians Unit, the Economics Crimes Unit and Arson
2 Investigation Unit.

3 Q. Do you have any experience with regard to the execution
4 of search warrants?

5 A. I do.

6 Q. And what is your role with regard to that?

7 A. I supervise the execution of search warrants for the
8 various members of my units that actually do the executions,
9 and I participated in search warrants on several occasions.

10 Q. And did you do any training with regard to those search
11 warrants; executions of the search warrants?

12 A. I've attended training regarding those.

13 Q. And here, today, as an Investigator Sergeant, are you
14 fully familiar with those policies?

15 A. I believe I am.

16 Q. Okay. And why don't you tell us -- tell the ladies and
17 gentlemen of the jury, what is the policy with regard to the
18 execution of search warrants, if officers know in advance
19 that there is a dog at the residence?

20 MR. FULLER: Objection, Your Honor. Are we talking
21 about knock or no-knock?

22 THE COURT: Overruled. Is there a policy on that
23 issue?

24 THE WITNESS: I'm sorry, could you repeat it?

25 MS. AGOLA: Sure.

1 BY MS. AGOLA:

2 Q. Would you kindly tell the ladies and gentlemen of the
3 jury, what is the policy in the County of Monroe with regard
4 to the execution of search warrants if officers know in
5 advance that there's a dog present at the residence?

6 THE COURT: Is there a policy regarding the execution
7 of search warrants, if the officers know in advance there's a
8 dog at the residence?

9 THE WITNESS: There's not a specific policy, no.

10 BY MS. AGOLA:

11 Q. Okay. Is it fair to say that -- strike that.

12 Is there a policy at all?

13 A. It's up to the individual supervisor briefing the warrant
14 team. That is always one of the considerations that is
15 actually asked and addressed.

16 Q. And isn't that because the person who is conducting the
17 briefing has to make the members of the entry team aware of
18 any potential dangers on the scene?

19 A. Correct.

20 Q. And one of those potential dangers might be a dog intent
21 on protecting his realm?

22 A. Dogs, children, correct. A lot of things come up during
23 these that members are made aware of.

24 Q. Are officers trained at the County to recognize whether a
25 dog is vicious or not?

1 A. It's discussed. I don't know if they are specifically
2 trained in it.

3 Q. Okay. Is there a formal policy with regard to that?

4 A. With regard to --

5 Q. Recognizing a vicious dog.

6 A. I don't believe we have a formal policy on that, no.

7 Q. Is there a policy with regard to the use of lethal force
8 against an animal?

9 A. There is.

10 Q. And can you briefly describe what that policy is?

11 A. The dog has to be a danger to the individual officer or
12 others.

13 Q. Is there a policy with regard to the use of non-lethal
14 force against animals?

15 A. I've never read one on non-lethal force, no.

16 Q. And would you characterize -- in your many years of
17 experience, would you characterize the custom for sheriffs at
18 the County, that when they encounter a dog at a residence,
19 that they have some latitude of discretion, some level of
20 discretion to make a split-second decision?

21 A. You're asking me to characterize?

22 Q. Is it fair to characterize the custom as being --
23 enabling the officers at that point to make a split-second
24 decision?

25 A. I believe the order that we're referring to, the use of

1 firearms and deadly physical force, states that it is up to
2 the officers individual discretion. They have to justify
3 their use of that deadly physical force.

4 Q. And, so, when they might engage or encounter an animal,
5 they have to think, shoot or don't shoot, right?

6 A. Correct.

7 MS. AGOLA: Thank you.

8 MR. FULLER: I have no questions. Thank you.

9 THE COURT: All right. Mr. Walsh, you may step down.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: It's getting a little warm in here. Why
12 don't we take a break, not that it will be any cooler when we
13 come back. We will use that as an excuse to take a break, and
14 we will resume in about 15 minutes.

15 Remember not to discuss the case and don't begin your
16 deliberations.

17 (The jury was excused.)

18 (Outside the presence of the jury.)

19 THE COURT: We are zipping right along. You have one
20 more witness?

21 MS. AGOLA: Yup.

22 THE COURT: And, Paul, you better figure out how to
23 run the video machine on this break.

24 MR. FULLER: Today, Judge?

25 THE COURT: Yeah. I think we will finish with

1 Christina, we will take a break, and then we will come back
2 and you will run the video, and then we will be done for the
3 day. And we will have a charging conference in the morning
4 and you can sum up tomorrow.

5 (Recess at 2:08 p.m., until 2:26 p.m.)

6 THE COURT: Christina, are you ready?

7 MS. AGOLA: Yes.

8 THE COURT: We are ready for the jury.

9 (The jury was brought in.)

10 THE COURT: Ms. Agola, you may call your next
11 witness.

12 MS. AGOLA: I call my final witness to the stand, and
13 that is Mr. Carroll.

14 THE COURT: David Carroll, please step forward here.
15 Place your left hand on the Bible and raise your right hand.
16 David Carroll ,
17 called herein as a witness, after having first been duly
18 sworn, was examined and testified as follows:

19 THE CLERK: Please be seated. When you're seated,
20 please state your full name and spell your last name for the
21 record.

22 THE WITNESS: My name is David Carroll,
23 C-a-r-r-o-l-l.

24 THE COURT: Good afternoon, Mr. Carroll.

25 THE WITNESS: Same to you.

1 DIRECT EXAMINATION

2 BY MS. AGOLA:

3 Q. Good afternoon, Mr. Carroll. How are you?

4 A. Pretty good.

5 Q. Can you please tell the ladies and gentlemen of the jury
6 how old you were back in October of 2006?

7 A. Twelve.

8 Q. How old are you now?

9 A. Seventeen.

10 Q. Do you recall when your family first obtained Damian?

11 A. Six months before he died.

12 Q. And did you name him Damian?

13 A. Yeah.

14 Q. Why?

15 A. Me and my mom. Both my brothers have the same first
16 initial as me, which is "D", and the dog was like a brother
17 to us, so we named him Damian, because it started with a "D".

18 Q. What are the names of your other two brothers?

19 A. Derrick and Devan.

20 Q. Did you have a nickname for Damian?

21 A. Meatball.

22 Q. Meatball?

23 A. Yeah.

24 THE COURT: Mr. Carroll, try to keep your voice up so
25 the jury can hear you.

1 BY MS. AGOLA:

2 Q. Do you recall where your family obtained Damian from?

3 A. In the City somewhere. I'm not sure where.

4 MS. AGOLA: I'm having a difficult time hearing him.

5 THE COURT: Just keep your voice up.

6 BY MS. AGOLA:

7 Q. What sort of breed was he?

8 A. Bullmastiff.

9 Q. And do you recall how big he was back in October of 2006?

10 A. Like two feet tall, 50 pounds.

11 Q. At the time he died, how old was he?

12 A. Between six and eight months.

13 Q. Where was the dog kept?

14 A. In the house.

15 Q. And what sorts of activities did Damian engage in with
16 your family?

17 A. Just going on walks and running with him. We used to
18 play around with him in the backyard.

19 Q. How much of the day did you spend with him?

20 A. Like two-thirds of the day I would be with him.

21 Q. Was he playful?

22 A. Yeah.

23 Q. Was he curious?

24 A. Yeah.

25 Q. Was he sociable?

1 A. Yeah.

2 Q. Was he aggressive?

3 A. No.

4 Q. Was Damian ever picked up by Animal Control?

5 A. No.

6 Q. Did anyone ever complain to you in the neighborhood about
7 him?

8 A. No.

9 Q. About his barking?

10 A. No.

11 Q. Did he ever bite anybody?

12 A. No.

13 Q. Where were you the night of October 11, 2006?

14 A. In the back room of my house.

15 THE COURT: Mr. Carroll, this is important, so try to
16 lean in, speak into the microphone, and try to keep your voice
17 up so the jury can hear you.

18 BY MS. AGOLA:

19 Q. And was the dog with you?

20 A. Yes.

21 Q. And were you watching TV?

22 A. Yes.

23 Q. And did you hear a gunshot?

24 A. Yeah.

25 MR. FULLER: I object to the leading nature of the

1 questions, Your Honor.

2 THE COURT: Try to ask them in a non-leading fashion.

3 BY MS. AGOLA:

4 Q. Did you hear any significant sounds that evening?

5 A. Yeah.

6 Q. What did you hear?

7 A. A loud, like, explosion sound.

8 Q. What else did you hear?

9 A. My dog making like a yelping sound, crying sound. Like a
10 loud pitched, like -- I can't really describe it. A yelp.

11 Q. Did you see Damian after he was shot?

12 A. Yeah, like, about 15 minutes after he got shot.

13 Q. And what did you see?

14 A. Him laying on the ground, and I saw the blood on the
15 ground around his head.

16 Q. What were you feeling at that point?

17 A. Sick to my stomach.

18 Q. Do you miss the dog?

19 A. Yeah.

20 MS. AGOLA: Thank you.

21 CROSS-EXAMINATION

22 BY MR. FULLER:

23 Q. Good afternoon, sir.

24 A. Same to you.

25 Q. Can you speak up a little bit?

1 A. Yeah.

2 Q. Now, you indicated that you don't know where Damian was
3 purchased?

4 A. No.

5 Q. Was it the City of Rochester, though?

6 A. Yes.

7 Q. And what breed did you indicate Damian was?

8 A. Bullmastiff.

9 Q. Isn't it true -- well, first of all, do you remember
10 testifying July 29, 2009, in an examination before trial?

11 A. I recall being there, yeah.

12 Q. I asked you questions, other attorneys asked you
13 questions?

14 A. Yeah.

15 Q. And you swore to tell the truth at that time, correct?

16 A. Yes.

17 Q. And the testimony you gave at that time was the truth?

18 A. Yes.

19 Q. Certainly. Do you recall stating that -- to the
20 question -- and this, counsel, would be page 17 of his
21 deposition, and that would be line 15 and 16. The question
22 would be, "Do you know what kind of dog he was?" Referring
23 to Damian. And your answer was, "Pitbull Mastiff."

24 Do you recall that?

25 A. No, I don't.

1 Q. You do recall testifying at the deposition, correct?

2 A. Yes.

3 Q. And being asked questions?

4 A. Yes.

5 Q. Do you recall being asked, "Who decided on the name? Why
6 did you name him Damian?" And your answer was, "I don't
7 know. It just sounded like a good name."

8 A. No, I don't remember that.

9 Q. But today you're testifying that you named him Damian
10 because of the "D"?

11 A. Yes.

12 Q. But you don't remember in July saying you just picked
13 that because it sounded like a good name?

14 A. No, I don't.

15 Q. Isn't it true after the dog was shot it died instantly;
16 there was no noise, there was no yelping?

17 A. I heard a yelp come from him.

18 Q. You're stating you heard yelping?

19 A. Yes.

20 Q. Did you also previously state that you were in the
21 hallway?

22 A. Yes.

23 Q. Do you recall that?

24 A. Yes.

25 Q. Isn't it true you were never in the hallway, it was your

1 mother, Sherry Carroll, who was in the hallway?

2 A. I was behind my mom.

3 Q. You were behind your mom?

4 A. Yes.

5 Q. Isn't it true when you testified previously that you
6 never testified that your mom was in the hallway at all,
7 correct?

8 A. Correct.

9 Q. As a matter of fact, you testified that you were holding
10 the dog in your arms and bent down by the dog. Do you
11 remember that testimony?

12 A. Yes.

13 Q. That wasn't true, was it, sir?

14 A. It was true.

15 Q. Isn't it true that the officers that looked down the hall
16 saw just the dog, and then your mother behind the dog; that
17 you were not there?

18 A. Possibly.

19 Q. And isn't that a fact because you weren't there?

20 A. I was in the hallway. I was behind my mom.

21 Q. You indicated during your deposition, basically, that the
22 officer was screaming to you, "let go of the dog, let go of
23 the dog", and you had the dog by the collar.

24 Isn't it a fact you never had that dog by the collar?

25 A. Yes.

1 Q. So, you weren't being honest at your deposition, correct?

2 A. I must not have been.

3 Q. And that was July 29, 2009 that you were under oath?

4 THE COURT: Is that a question?

5 MR. FULLER: Yes.

6 BY MR. FULLER:

7 Q. Were you under oath? Do you remember that?

8 A. I don't recall being put under oath, no.

9 Q. Would it make a difference to you if you swore to tell
10 the truth or you didn't?

11 A. Yes.

12 Q. So, if you don't recall being under oath, that would be
13 an excuse for you not to tell the truth?

14 A. I wouldn't have lied if I did in the first place, if I
15 was under oath.

16 Q. Well, what's correct then? Did you, in fact, have the
17 dog by the collar in the hall as the police were yelling to
18 you, "let go of the dog"?

19 A. No, I didn't.

20 Q. So, you weren't even there, correct?

21 A. I was in the hallway.

22 Q. Do you recall stating that you were holding the dog with
23 both your arms around him, and were actually squatting and
24 kneeling down. Do you recall that?

25 A. No.

1 Q. You don't recall?

2 A. No.

3 Q. Do you recall stating that you were holding the dog by
4 the collar, you picked the dog up in your arms, you bent down
5 and grabbed him, and you cradled him in your arms. Do you
6 recall that?

7 A. No.

8 Q. But it's your testimony today none of that ever happened?

9 MS. AGOLA: Objection. He didn't testify to that.
10 He didn't testify to any location.

11 MR. FULLER: I believe he said he wasn't --

12 THE COURT: Overruled.

13 BY MR. FULLER:

14 Q. Isn't it true you never saw the dog shot at all?

15 A. I didn't.

16 Q. You didn't purchase Damian, did you?

17 A. My mother did.

18 Q. You don't know how much the dog cost?

19 A. No, I don't.

20 Q. You didn't know where the dog was purchased, other than
21 the City of Rochester, correct?

22 A. Yeah, correct.

23 Q. Pardon?

24 A. Correct.

25 Q. Isn't it true the dog was never neutered?

1 A. I believe so.

2 Q. Do you believe he was never neutered or he was neutered?

3 A. He was never.

4 Q. He was never neutered. And you never took the dog to the
5 vet, correct?

6 A. My mom has before. I know he went to the vet for shots
7 and stuff.

8 Q. You personally never took him anywhere?

9 A. No.

10 Q. Never bought him food?

11 A. No.

12 Q. Your family had dogs prior to and after Damian; isn't
13 that true?

14 A. Yes.

15 Q. And mostly those were all Pitbulls?

16 A. We've had Golden Labs, we've had different kind of dogs.

17 Q. For the most part, they were Pitbulls, weren't they?

18 A. Yes.

19 Q. And do you recall you had dogs named Goliath, Tia and
20 Right Eye?

21 A. Yes.

22 Q. Do you recall those dogs? Do you recall what happened to
23 those dogs?

24 A. We got rid of them, and two of them were puppies.

25 Q. Isn't it true Greece Police had to take them away after

1 your father requested they be euthanized?

2 A. Yes.

3 Q. Because they attacked your mother? "They turned vicious
4 and attacked your mother for no apparent reason"?

5 A. No.

6 Q. That, "they were vicious in nature and unpredictable."

7 Isn't it true that's what your father told Greece Police?

8 A. No.

9 Q. These were dogs you had after Damian?

10 A. Yes.

11 Q. Three of them?

12 A. Yes.

13 Q. And all three of them were euthanized?

14 A. No. Two of them were puppies, and we got rid of one of
15 them.

16 Q. So, you have the other two is what your testimony is?

17 A. No, we have none of them now. We had three other
18 puppies.

19 Q. Isn't it true that one of them also bit your father
20 before they attacked your mother?

21 A. No.

22 Q. January 22, 2009, these three dogs were destroyed, based
23 on your father's call to Greece Police, because they attacked
24 your mother; isn't that true, sir?

25 A. No, my mom called to get the dogs picked up.

1 Q. Now, when the team made its entry, did you hear that
2 noise?

3 A. Which noise?

4 Q. The noise of the door being broken down.

5 A. Yes.

6 Q. Sir, I'm going to show you what's been marked as Defense
7 Exhibit No. 406 for identification. Do you recognize that?

8 A. Yes.

9 Q. Can you tell the jury what that is?

10 A. The front door to my house.

11 Q. And does that front door to your house have a mark in it,
12 damaged condition?

13 A. Yes.

14 Q. Is that a fair and accurate representation of the front
15 door to your house --

16 A. Yes.

17 Q. -- as it appeared after October 11, 2006?

18 A. Yes.

19 Q. And Exhibit No. 407 for identification, that's obviously
20 a photograph. Could you tell us what that depicts?

21 A. The hallway and front room to my house.

22 Q. And is that the front door to your house --

23 A. Yes.

24 Q. -- at the end of the picture?

25 A. Yes.

1 Q. Other than that gate, because that gate wasn't there on
2 October 11th, right?

3 A. Yes.

4 Q. Other than that gate and the woman in the hallway, is
5 that a true and fair and accurate representation of your
6 hallway facing the front door as it appeared on October 11,
7 2006?

8 A. Yes.

9 Q. And Defendant's Exhibit No. 408, is that just a closer
10 depiction of what was shown in 407?

11 A. Yes.

12 Q. And same with photograph 409 for identification, is that
13 an even closer depiction?

14 A. Yes.

15 Q. And are all these photographs true, fair and accurate
16 representations of how the inside of your home and your door
17 looked on October 11, 2006?

18 A. Yes.

19 MR. FULLER: At this time, Your Honor, I'd like to
20 enter them into evidence.

21 THE COURT: Any objection?

22 MS. AGOLA: No.

23 THE COURT: 406, 407, 408 and 409 are admitted.

24 BY MR. FULLER:

25 Q. Now, 409 that's now in evidence -- and again, you've

1 testified that gate was not there. Does that show your
2 living room area?

3 A. Yes.

4 Q. And is that the area where Damian was shot?

5 A. Yes.

6 Q. And with regard to 407, is that the hallway that Damian
7 was walking down?

8 A. Yes.

9 Q. And he was walking down toward your front door, correct?

10 A. Yes.

11 MR. FULLER: I have no further questions. Thank you
12 very much.

13 THE WITNESS: Yup.

14 THE COURT: Ms. Agola, any further questions?

15 REDIRECT EXAMINATION

16 BY MS. AGOLA:

17 Q. Mr. Carroll, your mother was ahead of you; is that
18 correct?

19 A. Yes.

20 Q. And did you hear the officers say anything to your
21 mother?

22 A. I heard them tell her to step out of the way.

23 Q. Now, at that point, had you stepped out of the way, too?

24 A. Yeah. I was in the bedroom that she just came out of.

25 Q. And your testimony here today is that you did not see

1 this dog be shot?

2 A. No, I heard it.

3 Q. But you heard it?

4 A. Yeah, and I saw the flash.

5 Q. And then, after the dog was shot, you did see the dog on
6 the living room floor dead?

7 A. Yes.

8 MS. AGOLA: Thank you.

9 MR. FULLER: Nothing.

10 THE COURT: Mr. Carroll, thank you. You may step
11 down.

12 Ms. Agola, anything else?

13 MS. AGOLA: No, the Plaintiff rests.

14 THE COURT: All right. Ladies and gentlemen, that
15 includes the proof that is being offered by Mr. Carroll by his
16 attorneys, and it's customary that we take a brief recess. We
17 will recess for probably about 15 minutes. After the recess I
18 would expect that the defense will present their case. And
19 Mr. Fuller, you have one video deposition, right?

20 MR. FULLER: I have it, Your Honor, whether we play
21 it or not --

22 THE COURT: We are having a few technical
23 difficulties, so I expect we will have you back in 15 minutes
24 with a video for you to watch. If we're a few minutes more
25 than that, we're trying to work out technical glitches.

1 Don't discuss the case. The Plaintiff has rested,
2 the Defendant has not begun their case, so you must not begin
3 your deliberations. Be sure to keep an open mind and we will
4 see you after the break. Thank you.

5 (The jury was excused.)

6 (Outside the presence of the jury.)

7 THE COURT: Mr. Marianetti, you indicated that you
8 had a motion that you intended to make following the
9 conclusion of the Plaintiff's proof?

10 MR. MARIANETTI: Yes, Your Honor.

11 THE COURT: Go ahead.

12 MR. MARIANETTI: Yes. At this time, Your Honor,
13 Defendant's would move for a judgment as a matter of law in
14 favor of Defendants on the grounds that there has been
15 insufficient evidence produced showing that the shooting of
16 the dog was an unreasonable seizure under the Fourth
17 Amendment. Additionally, there's been no offer of proof as to
18 ownership of the dog, that David Carroll did own the dog. So,
19 Defense would argue that there can't be recovery for
20 unreasonable seizure of property that was not owned by David
21 Carroll.

22 MS. AGOLA: We cross-move for Judgment NOV. We
23 believe here that the proof is such that it demonstrates that
24 there was actually no policies, that the police officers had
25 advance noticed that there was an animal present, that there

1 was no training. That there's a complete lack of training and
2 a deliberate choice to exercise no other non-lethal
3 alternatives, and that this dog was shot for no good reason.

4 And with regard to the ownership, the Plaintiff in
5 this case is a minor, and the mother is -- or the family owns
6 the dog and he is a part of the family.

7 THE COURT: All right. I'm going to deny the motion
8 insofar as it is based upon the contention that because there
9 was no testimony that the minor's funds were used to purchase
10 the dog, as opposed to the mother purchasing the dog for the
11 family. I'm going to deny it on that basis.

12 As to the remainder of your motion and the
13 Plaintiff's cross motion, I will reserve on that.

14 MR. MARIANETTI: There were additional grounds I
15 wanted to just talk to you about.

16 THE COURT: Go ahead.

17 MR. MARIANETTI: I'd also like to move on the failure
18 to train claim, on the grounds that there was insufficient
19 evidence to reach the standard to show that there was a
20 deliberate deference to the rights of individuals that the
21 police would come into contact with. There was evidence about
22 extensive training regarding the execution of search warrants.

23 And I'd also, on additional grounds, make the motion
24 for a judgment in favor of Defendant, County of Monroe, on the
25 grounds that there was no direct involvement, and there was no

1 policy or custom established as to result in unconstitutional
2 acts.

3 THE COURT: All right. Thank you. I will reserve on
4 those motions, as well.

5 MR. MARIANETTI: Thank you.

6 THE COURT: All right. So, we will proceed to the
7 Defendant's case. And I'm right that we've got one video,
8 right?

9 MR. FULLER: Yes, Your Honor.

10 THE COURT: So, hopefully we can get that all ironed
11 out and then what we will do is excuse the jury. I will give
12 you, after I make just a couple of changes, some proposed jury
13 instructions for you two, and a special verdict form for you
14 to look at overnight. And I think what we will do is
15 reconvene tomorrow morning about 9:00. I will have the jury
16 come in later than that, so you can tell me any issues you
17 have with instructions and we can hammer those out. That way
18 you will know what the instructions will be before you have to
19 sum up. Okay?

20 MR. FULLER: Sounds good, Your Honor. And with
21 regard to the stipulation? That will be read by Your Honor
22 during --

23 THE COURT: In your case, just offer the stipulation
24 and then I will read it. But just make sure you do offer it,
25 so I don't forget to read it. Anything else?

1 MS. AGOLA: No, Judge.

2 MR. MARIANETTI: Thank you, Judge.

3 THE COURT: We will take a few minutes until Paul is
4 ready to operate the video.

5 (A recess was taken.)

6 (The jury was brought in.)

7 THE COURT: Mr. Fuller, are you ready to proceed?

8 MR. FULLER: I hope so, Judge. I will call my next
9 witness. That would be Greece Police Officer Joseph Hopper.

10 THE COURT: And by agreement of the parties and the
11 Court, you will hear Officer Hopper's testimony through a
12 video deposition that will be played for you on -- it will
13 play on the monitors in front of you. If at any time you
14 don't see it on the monitors in front of you, let us know. We
15 think, hopefully, we corrected the problems we were having
16 with that.

17 Mr. Fuller?

18 (Exhibit was played for the jurors.)

19 THE COURT: Mr. Fuller, do you have any other
20 witnesses or evidence to offer?

21 MR. FULLER: Yes, Your Honor. For the record, I
22 would offer Defense Exhibit No. 404, which is a stipulation.
23 I'd offer that into evidence. I'm showing Plaintiff's
24 counsel, and obviously it's an agreement.

25 THE COURT: Ladies and gentlemen of the jury, I will

1 now read to you the stipulation that has been entered into and
2 agreed to by the parties. You should consider the facts as
3 set forth herein as true and agreed to facts between the
4 parties.

5 The parties stipulate as follows: Number one,
6 Plaintiff David Carroll stipulates and agrees that the
7 no-knock search warrant ordered by a County Court Judge and
8 executed at 284 Ridgedale Circle on October 11, 2006, was in
9 all respects proper and based upon probable cause.

10 Two, Plaintiff is not challenging the reason for the
11 no-knock search warrant or the reason that the law enforcement
12 officers had in entering the premises.

13 Three, Plaintiff agrees that the GRANET officers
14 properly and lawfully entered the premises in the ordinary
15 course of their duties to execute the court ordered no-knock
16 search warrant.

17 Anything further Mr. Fuller?

18 MR. FULLER: No, Your Honor. Defense rests.

19 THE COURT: All right. Ladies and gentlemen, that
20 concludes the proof in this matter. The trial has moved more
21 swiftly than we anticipated, which I suppose is good news for
22 you.

23 Do remember, however, that I have not instructed you
24 to begin your deliberations yet, so you still may not discuss
25 the case with one another, and you certainly may not discuss

1 the case with anyone else. You are instructed further to
2 continue to keep an open mind.

3 When we resume tomorrow, the attorneys will make
4 their closing arguments to you, following which I will
5 instruct you on the law. At that point, you will retire to
6 the jury room and then you will be instructed that you may
7 begin your deliberations.

8 So, we're done about ten minutes earlier than I
9 anticipated today. I'm going to have you return tomorrow at
10 11:00 so that I may meet with the attorneys ahead of time, so
11 that we can go over some legal matters concerning the legal
12 instructions.

13 Then, when you come to court at 11:00, you can expect
14 to hear their closing arguments and receive the Court's
15 instructions. We will, if you are deliberating at that point,
16 provide you lunch and you can begin your deliberations
17 following the instructions. Okay?

18 Thank you for your service today. Get home safely,
19 return to court safely, and we will see you at 11:00. And you
20 should assemble in the jury room. Ms. Mar will take your
21 notebooks tonight so don't take them home. Thank you.

22 (The jury was excused.)

23 THE COURT: Counsel, I've got proposed special
24 verdict forms, which I will give both of you or all of you.
25 You can look at those overnight. We will get together

1 tomorrow morning, why don't we say 9:30, and you can tell me
2 if you have any objections to the verdict form.

3 If you want to come to my office in about ten minutes
4 I can give you the proposed jury instructions, as well. I
5 just want to make a couple of changes to them based on what
6 I've heard today.

7 Let me just -- just a couple of things as you go
8 through the jury instructions. I'm, of course, happy to
9 entertain any issues you have with any of the instructions,
10 including any that you think should be given that are not in
11 there.

12 I would say the ones to pay particular attention to
13 is the instruction concerning the unreasonable seizure, the
14 claim that the shooting of the dog amounts to an unreasonable
15 seizure. That's one for which there is no model instruction
16 and I've put together based on an analysis of, for the most
17 part, a number of cases that are listed at the bottom of that
18 instruction. That's the one that instructs them, among other
19 things, that they are to consider the totality of the
20 circumstances. And you can, if you read the cases, see where
21 I got the language. But I would pay particular attention to
22 that instruction, as well as the instruction on failure to
23 train and deliberate inference. That's another instruction
24 that I spent a fair amount of time with. So, those two
25 probably got more of my attention than the other ones which

1 are more commonly given.

2 Take a look at those. I instruct the jury and I want
3 to make sure that we're all in agreement here. If they find
4 liability against the individual Defendant Carroll, then they
5 will proceed to consider whether there is Monell liability to
6 be imposed against the County, under either the theory of an
7 unconstitutional policy or custom or deliberate inference with
8 respect to failure to train.

9 If they find that Officer Carroll is not liable, they
10 do not continue onto the question of liability against the
11 County. So, the verdict form is structured that way, and I
12 instruct them on that, as well.

13 If they find Officer Carroll liable and the County
14 liable on either of your theories under 1983, my view is that
15 the Plaintiff has suffered one injury, for which compensable
16 damages may be awarded. He hasn't suffered separate injuries
17 as a result of the County's liability and the individual
18 Defendant's liability.

19 So, the jury form asks them to go through claim one
20 against Officer Carroll first. If they find that he is not
21 liable, that's the end of the matter. If they find that he is
22 liable, then they proceed to consider the County's liability
23 on the two theories. Then, if they find any of those
24 defendants liable, they are to award one sum of compensatory
25 damages, and I have instructions that indicate why, in this

1 case, we're talking about one injury with one sum of
2 compensable damages.

3 I just wanted to bring that to your attention. So,
4 look at those two instructions in particular. That's how the
5 verdict form is set out. Why don't we meet at 9:30. I don't
6 think it's going to take us an hour and a half, but if you all
7 have issues and you want me to incorporate them, it's going to
8 take me some time to be able to do that before they come back
9 at 11:00. So, that's what I was thinking. So, let me give
10 you the verdict forms now, and if you just come down in about
11 ten minutes you can get the instructions.

12 Anything else? Thank you for being so efficient.

13 (The proceeding adjourned at 3:52 p.m.)

14 * * *

15 CERTIFICATE OF REPORTER

16
17 I certify that the foregoing is a correct transcript
18 to the best of my ability of the record of proceedings in the
19 above-entitled matter.

20

21 S/ Erin R. Keniston

22 Erin R. Keniston, RPR

23 Official Court Reporter

24

25

1 THE COURT: The the record should reflect that I'm
2 here in court with Ms. Agola and Mr. Laprade. I was informed
3 by the Court's marshals that Ms. Agola had an issue that she
4 wanted to raise with me concerning conduct of one of the
5 jurors. Mr. Fuller, counsel for the Defendant, has apparently
6 left the building. They're not here.

7 I don't know what the issue is, so I will, at this
8 point, allow Ms. Agola to indicate for the record what the
9 issue is she wants raised with the Court.

10 MS. AGOLA: Well, Your Honor, I wasn't looking
11 directly at -- is it the last juror?

12 MR. LAPRADE: I was the one, actually.

13 THE COURT: One at a time. Mr. Laprade?

14 MR. LAPRADE: Judge, I was the one who actually made
15 the observation. I just -- shortly after the verdict was
16 announced, and right before the jury was excused, as they all
17 stood up to leave I observed juror number eight, with her left
18 hand, waive at the defense table. I just didn't know what to
19 make of it at the time. It took me a second to process what I
20 had just seen. Maybe there was nothing to it, but I just
21 found it sort of odd that a juror would be waiving.

22 I'm not sure who she may have been waiving to, but it
23 certainly seemed her eyes were looking over my head, right
24 behind me, toward defense counsel table. And she clearly,
25 with her left hand, kind of waived like -- I know it's not

1 going come to up in the record, but it seemed to me almost
2 like a waive you might give someone you were familiar with.

3 I don't know, but I found it very odd, and I
4 mentioned it to Ms. Agola, and we thought it was best to at
5 least make the Court aware of that. Whatever it means, I
6 don't know, but I found it odd.

7 THE COURT: All right. I will supplement the record
8 by indicating that defense table is physically situated in
9 front of the left side of the gallery, as you're facing
10 forward. I don't think Mr. Laprade is indicating with
11 certainty that the gesture, if it was a waive, was directed
12 toward -- it may have been directed in that direction, whether
13 it may have been to somebody in the gallery who was behind
14 defense table. The juror in question was number four,
15 Ms. Reynard?

16 MS. AGOLA: Number eight. Ms. Casciola, I believe.

17 THE COURT: Ms. Casciola?

18 MR. LAPRADE: Correct.

19 THE COURT: All right. I think, given the fact that
20 Mr. Fuller is not here and that I have accepted the verdict,
21 and in that sense discharged the jury, I wanted to let you
22 make whatever observations you want to make.

23 I'm not comfortable, at this time, questioning
24 Ms. Casciola without allowing Mr. Fuller to be heard on this.

25 MR. LAPRADE: Understood.

1 THE COURT: We know who she is, we have contact
2 information. I would say you've placed it on the record, why
3 don't you go back and talk about the issue further. If you
4 have an application to make -- if you look at the case law and
5 think there's something further you would like the Court to
6 do, certainly make that application, and I'm happy to consider
7 it, and we will have Mr. Fuller then respond to that.

8 MS. AGOLA: Very good.

9 MR. LAPRADE: Thank you, Your Honor. And just to be
10 clear, I'm not opining who she may have been waiving to. It
11 certainly could have been somebody in the gallery.

12 THE COURT: That's fine. I don't think that -- I
13 think you've done the proper thing in raising the issue. I
14 think it's a technical matter. The verdict is in and, so --
15 otherwise, I would have Mr. Fuller come in, I would question
16 her now. That may, at some point, be the relief that you're
17 seeking, and I would have to look at the cases in order to
18 determine when it is appropriate for a judge to then make some
19 post-verdict inquiry of a juror. And I don't want to do that
20 without giving opposing counsel an opportunity to be heard on
21 whether relief is appropriate, and if so, what kinds.

22 So, thank you for bringing it to the Court's
23 attention, and I will wait to hear from you as to whether you
24 have any formal application for some action or relief from the
25 Court.

1 MR. LAPRADE: Thank you, Your Honor.

2 THE COURT: Anything else?

3 MS. AGOLA: Very good.

4 THE COURT: Thank you very much.

5 MR. LAPRADE: Have a nice afternoon.

6 * * *

7 CERTIFICATE OF REPORTER

8

9 I certify that the foregoing is a correct transcript
10 to the best of my ability of the record of proceedings in the
11 above-entitled matter.

12

13 S/ Erin R. Keniston

14 Erin R. Keniston, RPR

15 Official Court Reporter

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CASE
NO. 07-6123
EXHIBIT
NO. 2





EXHIBIT D

1 Denise Sailer ,
2 called herein as a witness, after having first been duly
3 sworn, was examined and testified as follows:

4 THE CLERK: When you are seated, please state your
5 full name and spell your last name for the record.

6 THE WITNESS: Denise Sailer, S-a-i-l-e-r.

7 THE COURT: Good afternoon, Ms. Sailer.

8 THE WITNESS: Good afternoon.

9 THE COURT: Ms. Agola, you may proceed.

10 DIRECT EXAMINATION

11 BY MS. AGOLA:

12 Q. Good afternoon, Ms. Sailer. How are you today?

13 A. Very well. Thank you.

14 Q. Ms. Sailer, where do you currently reside?

15 A. 140 Ava Street in Rochester.

16 Q. And have you always resided at that address?

17 A. No, I have not.

18 Q. Going back to October of 2006, where did you reside?

19 A. 18 Woodside Lane in Greece.

20 Q. Do you have any children?

21 A. Yes, I do, one; a son, he's 20.

22 Q. And do you know the Carroll family?

23 A. I do.

24 Q. For how long did you know the Carroll family?

25 A. Since 1999.

1 Q. How did you come to know them?

2 A. When I moved on to Ridgedale Circle I met them. We're
3 neighbors.

4 Q. How many houses down would you say you were from them?

5 A. Five, maybe six.

6 Q. Did you know their dog Damian?

7 A. Yes, I did.

8 Q. Do you recall what type of breed of dog he was?

9 A. A Bullmastiff.

10 Q. Do you recall when you first met Damian?

11 A. I met Damian shortly after they got him. He was a puppy.

12 Q. Do you recall how tall he was?

13 A. Last time I saw Damian he was probably two and a half,
14 maybe three feet tall.

15 Q. And can you approximate for us how much he weighed?

16 A. About 50 pounds.

17 Q. Was he a tail wagger?

18 A. Yes, he was. Yes.

19 Q. Ms. Sailer, did Damian seem overly protective of the
20 Carroll house?

21 A. No.

22 Q. Did he seem overly protective of the Carroll's?

23 A. No.

24 MR. FULLER: I would object, Your Honor.

25 THE COURT: Sustained as to form.

1 BY MS. AGOLA:

2 Q. Did your children ever play with Damian?

3 A. Yes, all the time.

4 Q. Did you ever have occasion to visit the Carroll
5 residence?

6 A. Yes, I have.

7 Q. And how did Damian act when you knocked on the door?

8 A. He would bark. When the door was open, he would be
9 wagging his tail and anxious to see me.

10 Q. And how did that make you feel?

11 A. Good.

12 MR. FULLER: Objection as to the "anxious to see me".

13 THE COURT: Overruled.

14 BY MS. AGOLA:

15 Q. What would you say the reputation, if any, Damian had in
16 the neighborhood?

17 A. He was a family dog. He had a good reputation. He was a
18 puppy, friendly.

19 Q. Did you have any reason to be fearful of Damian?

20 A. No.

21 Q. Have you ever seen others be fearful around him?

22 A. No.

23 MR. FULLER: Objection.

24 THE COURT: Overruled.

25 BY MS. AGOLA:

1 Q. In the time that you lived in the Carroll neighborhood,
2 did you ever witness Damian act viciously or threatening to
3 anyone?

4 A. Never.

5 Q. Did you ever have any reason to complain about Damian to
6 Animal Control?

7 A. No.

8 Q. Did you ever contact the police regarding Damian?

9 A. No.

10 Q. Would you say that Damian is a gentle dog?

11 A. Yes.

12 Q. Would you say he's a friendly dog?

13 A. Yes.

14 Q. What would you base that opinion on?

15 A. My interaction with him, playing with him, watching him
16 walk throughout the neighborhood. The Carroll family would
17 walk their dog around the circle.

18 Q. Do you remember the last time you saw Damian?

19 A. The last time I saw Damian, he was being walked by the
20 Carroll family. And after that, my son came home and let me
21 know that Damian had been shot.

22 Q. And how did that make you feel?

23 A. Terrible. Damian was --

24 MR. FULLER: Objection.

25 THE COURT: Sustained.

1 BY MS. AGOLA:

2 Q. You said your son came home and told you?

3 A. Yes.

4 Q. Did your son play with Damian?

5 A. Daily.

6 MS. AGOLA: Nothing further.

7 THE COURT: Mr. Fuller?

8 MR. FULLER: Thank you, Judge.

9 CROSS-EXAMINATION

10 BY MR. FULLER:

11 Q. Good afternoon, ma'am.

12 A. Good afternoon.

13 Q. Your name is Denise Sailer, correct?

14 A. Correct.

15 Q. Do you have an ex-husband named Mike?

16 A. Yes, I do.

17 Q. Mike still live in New Jersey?

18 A. Yes.

19 Q. You indicated you lived at 18 Woodside Lane?

20 A. Correct.

21 Q. Approximately how long was that?

22 A. Almost eleven years.

23 Q. Did you ever live on Ridgedale Circle?

24 A. No, I did not.

25 Q. So, that's a different street, correct?

1 A. It is part of the circle, but a different street.

2 Q. And you're friends with the Carroll's?

3 A. I was neighbors with the Carroll's, not -- yes.

4 Q. You're friends with the Carroll's; you went down there,
5 you knew Sherry Carroll?

6 A. Correct.

7 Q. Your son's named Keith, correct?

8 A. Correct.

9 Q. And he played a lot with David Carroll; isn't that true?

10 A. Yes, correct.

11 Q. Were you familiar, then, with the goings on at 284
12 Ridgedale Circle?

13 A. No.

14 Q. Did you hang out there with your son?

15 A. No.

16 Q. Do you allow your son to hang out there?

17 A. Yes.

18 Q. And you indicated that Damian the dog -- and I noticed
19 you hesitated. You said he was a Bullmastiff?

20 A. Correct.

21 Q. Are you sure about that? I mean, are you familiar with
22 dog breeds?

23 A. Absolutely.

24 Q. Okay. And could he have been a Pitbull Mastiff?

25 A. As in a mixed breed?

1 Q. Correct.

2 A. I didn't see pedigree papers, correct.

3 Q. Are you familiar with other dogs the Carroll family
4 owned?

5 A. Somewhat, yes.

6 Q. Goliath, Tia, Right Eye?

7 A. No.

8 Q. You weren't familiar with those?

9 A. No.

10 Q. And is it fair to say you were never a police officer?

11 A. It is fair to say.

12 Q. Is it fair to say that you never had occasion to serve a
13 search warrant?

14 A. Correct.

15 Q. As a matter of fact, a no-knock search warrant, you've
16 never had to do that, correct?

17 A. Correct.

18 Q. Do you harbor any type of ill feelings toward the police?

19 A. No.

20 Q. Now, I'm going to direct your attention to October 11,
21 2006, at approximately 6:45 p.m.. Do you recall where you
22 were?

23 A. No, I do not.

24 Q. Is it fair to say you were not at 284 Ridgedale Circle?

25 A. Correct.

1 Q. It's accurate to say that you were not there when the
2 GRANET officers were serving a court ordered no-knock search
3 warrant; isn't that true?

4 A. Correct.

5 Q. So, you weren't in the house?

6 A. No, I was not.

7 Q. So, you didn't have any observations, whatsoever, with
8 regard to the entry by law enforcement officers, correct?

9 A. Correct.

10 Q. And in all honesty, you can't tell us how Damian was
11 acting toward the police on October 11, 2006, can you?

12 A. Correct.

13 MR. FULLER: No further questions. Thank you, ma'am.

14 REDIRECT EXAMINATION

15 BY MS. AGOLA:

16 Q. Ms. Sailer, prior to October 11th of 2006, had you ever
17 seen the police at the Carroll residence?

18 A. I have.

19 Q. And, you know, incident to those occasions, you still saw
20 Damian, did you not?

21 A. Correct.

22 Q. And after October 11th of 2006, did you see Damian?

23 A. No.

24 MS. AGOLA: Thank you.

25 THE COURT: Any recross?

1 MR. FULLER: No recross, Your Honor. Thank you.

2 THE COURT: Thank you, Ms. Sailer. You may step
3 down. You're excused.

4 Ms. Agola, would you call your next witness?

5 MS. AGOLA: Officer DeSain. Sergeant DeSain.

6 Sergeant Michael R. DeSain ,
7 called herein as a witness, after having first been duly
8 sworn, was examined and testified as follows:

9 THE CLERK: Please be seated. When you are seated,
10 please state your full name and spell your last name for the
11 record.

12 THE WITNESS: My name is Michael R. DeSain. It's
13 D-e-S-a-i-n.

14 THE COURT: Good afternoon, sir.

15 THE WITNESS: Good afternoon, ma'am.

16 DIRECT EXAMINATION

17 BY MS. AGOLA:

18 Q. Good afternoon. Is it Sergeant DeSain?

19 A. Yes, it is.

20 Q. Sergeant DeSain, isn't it true that you were part of the
21 entry team that entered the Carroll residence on October 11th
22 of 2006?

23 A. It is true.

24 Q. And isn't it also true that you were the person who
25 conducted the briefing at the Greece Police station prior to

1 the execution of that warrant?

2 A. Yes, it is true.

3 Q. And is it fair to say that one of the purposes of
4 briefing the entry team is to make them alert as to any
5 potential dangers they might encounter?

6 A. Yes.

7 Q. One of those dangers, in your experience, is it fair to
8 say, would be a dog intent on guarding his home, correct?

9 A. Yes.

10 Q. The Carroll's reside in Greece, do they not?

11 A. They do.

12 Q. And during that briefing at the Greece Police station,
13 isn't it true that the entry team was made aware of the fact
14 that there was a dog at the Carroll residence?

15 A. I don't recall whether they were or not.

16 Q. Okay.

17 MS. AGOLA: Your Honor, the witness does not have an
18 evidence book before him. Can I put this to him?

19 THE COURT: Why don't you take out the exhibit you
20 want to show him, and let Mr. Fuller know what you're showing
21 him. What are you showing him?

22 BY MS. AGOLA:

23 Q. I'm going to be showing you what's been marked as
24 Plaintiff's Exhibit 1. Take a moment to review that, and
25 when you're ready, can you identify the document for me?

1 A. I'm ready.

2 Q. What is that document?

3 A. It's a Greece Police Department Field Interview Form.

4 Q. What would be the purposes of a document like that?

5 A. An officer typically will complete a form such as this
6 for intelligence purposes; to notify other officers or
7 agencies of something they may have encountered involving
8 either a residence or a person.

9 Q. Would they also prepare this form in anticipation of
10 executing a search warrant?

11 A. No.

12 Q. Well, look at the date of the document on the top. What
13 is the date of the document?

14 A. October 8th of 2006.

15 Q. That's about three days before the execution of the
16 Carroll warrant, is it not?

17 A. Yes, it is.

18 Q. And the briefing was held at the Greece Police station,
19 was it not?

20 A. I am not sure if it was at the Greece Police station or
21 at the Public Safety Building downtown. I don't recall where
22 the actual briefing was held.

23 Q. Okay. And if you look down on the narrative, can you
24 read that paragraph for us?

25 MR. FULLER: I'm going to object, Your Honor. That's

1 a document not in evidence.

2 THE COURT: Sustained.

3 MS. AGOLA: Well, Your Honor, at this time I'm going
4 to move to have the document placed into evidence.

5 MR. FULLER: I would object, based on no foundation,
6 hearsay.

7 THE COURT: Sustained.

8 BY MS. AGOLA:

9 Q. Sergeant DeSain, is it your testimony here today that you
10 did not prepare the entry team for the possibility that there
11 might be a dog present?

12 A. That's correct.

13 Q. So, the entry team went in not knowing a danger -- a
14 potential danger?

15 A. Well, as I stated, I don't recall that document. I don't
16 recall any knowledge of a dog prior to entering that
17 residence. If I had that knowledge, I would absolutely have
18 informed our team of that.

19 Q. Okay. And what would you have informed the team to do?

20 MR. FULLER: Objection; speculation.

21 THE COURT: Overruled.

22 THE WITNESS: Be careful, there's a dog at the
23 residence. That's what I would have informed them.

24 BY MS. AGOLA:

25 Q. Be careful. What about using non-lethal forms to

1 restrain the dog?

2 A. No.

3 Q. How about pepper spray?

4 A. No.

5 Q. Catch pole?

6 A. No.

7 Q. How about a Bean Bag?

8 A. No.

9 Q. You never discussed any of those things with your
10 officers?

11 A. They were not discussed, no.

12 Q. Are you trained to use non-lethal forms of restraining
13 dogs in the execution of search warrants?

14 A. No.

15 Q. All right. Is it fair to categorize or characterize the
16 policy, or the custom that you're accustomed to, as
17 permitting a deputy to use their best judgment in a split
18 second decision making process to shoot or don't shoot?

19 A. Is that a question?

20 Q. Yes.

21 A. What is the question?

22 Q. The question is, what is -- if you don't train or there
23 is no policy with regard to the use of non-lethal force
24 against a dog, what is the policy?

25 A. Are you talking about knock search warrants or no-knock

1 search warrants?

2 Q. Well, let's deal with a no-knock search warrant.

3 THE COURT: Okay. And I think we need to clarify.

4 Are we talking about the policy of the Town of Brighton,

5 policy of Monroe County, the policy of GRANET?

6 MS. AGOLA: Right.

7 BY MS. AGOLA:

8 Q. And before we get there, isn't it fair to say that there
9 is countywide training with regard to the execution of search
10 warrants?

11 A. That's fair to say.

12 Q. So, there's not a separate policy, but for GRANET, right?

13 A. Correct.

14 Q. And the countywide training with regard to the use of
15 lethal force against animals, how would you characterize
16 that?

17 A. There is no training that would state when to use lethal
18 force against a dog. There is no specific training to
19 address that. If an officer is on a routine alarm at a home
20 and a dog runs out and attempts to attack him, there's
21 nothing in the book that says you will do A, B, C and D,
22 prior to destroying that dog.

23 Each officer who encounters a situation like this
24 uses his abilities as best as he can to try to handle that
25 threat of a dog. If it's running on top of a car to get away

1 from the dog, we would do that. You know, the last thing we
2 want to do is destroy an animal, but when I'm given the job to
3 execute a search warrant that is a no-knock warrant, we don't
4 have that ability. We don't have that ability to use Animal
5 Control, to use a less than lethal type of weapon. If I had
6 that ability, we would have chose to do that. We don't have
7 the time to do that, because our lives are at risk entering
8 that door.

9 If I were able to give a warning to the resident,
10 which would essentially be a knock warrant, then we would use
11 an alternative means. We would have Animal Control by our
12 side with a noose in order to, you know, obtain that dog to
13 prevent it from attacking us. But in this particular case we
14 don't have that option.

15 Q. And you don't have the training?

16 A. Would there be training?

17 Q. Sir, I'm asking you. Is there training?

18 A. No, there's no training.

19 Q. So, it's your testimony here today that there is no
20 training with regard to non-lethal uses to control a dog upon
21 the execution of a search warrant?

22 A. We have training in non-lethal weapons. Do we have
23 training specific to a vicious dog attacking us by using a
24 non-lethal weapon? We know from past precedent and
25 experience there are means that you could use if presented

1 with them, but, no, there's no book or training manual that
2 we would refer to use.

3 Q. And what are the means that you are referring to?

4 A. The means in what situation?

5 Q. Well, you just testified -- and I don't want to put words
6 in your mouth, but you said we're advised of means to
7 implement, but we're not trained in those means.

8 A. Well, the means would be the particular situation you're
9 talking about.

10 Q. All right. Let's talk about a no-knock warrant at the
11 Carroll residence on October 11th of 2006. You previously
12 testified that you had no knowledge there was a dog there,
13 correct?

14 A. Correct.

15 Q. And, so, in essence, what did that permit -- the first
16 person in, what did that permit him to do when he saw the
17 dog?

18 A. Well, first, for the record, with or without knowledge,
19 the end result would have been the same.

20 Q. Why is that?

21 A. There are no other means to handle a vicious dog
22 attacking you on a no-knock search warrant. When you enter a
23 house and a dog takes off after you and is about ready to
24 bite you and slow down the flow of the entry team into the
25 fatal funnel of this home, there is no other means presented,

1 other than to dispatch the dog that's vicious.

2 There are multiple occasions I've been on search
3 warrants with animals where the dog was not dispatched, and
4 that is the ideal way to handle it. However, if the dog
5 decides to attack an officer upon entry, what that does,
6 essentially, it slows down that officer getting through what
7 we in police worked are trained as the fatal funnel. If you
8 stop in that fatal funnel, other officers lives are at risk by
9 the bad guy or the bad person inside the home. They have
10 means to weapons.

11 They don't know we're there. We don't knock and say,
12 hey, you know, GRANET outside, let us in. We breach the door
13 by a court authorized search warrant without them knowing.
14 So, they could be in bed, they could be washing the dishes,
15 there's a ton of things that they could be doing. What
16 happens as a result of that, a vicious dog comes forward and
17 attacks one of our officers, and there's five guys behind him
18 that want to get through that door, and they can't get through
19 it because that officer is dealing with a threat; that threat
20 being a vicious dog.

21 Q. Okay. So, it's fair to say that prior to the entry to
22 the Carroll residence, that you did not formulate a plan to
23 isolate the dog?

24 A. Correct.

25 Q. And isn't it also true that you left the entry team, in

1 effect, with no other option but to shoot the dog if he posed
2 a threat?

3 A. I don't think that's a fair statement.

4 Q. Well, you didn't instruct the team, did you?

5 A. Whether I did or did not instruct the team, there would
6 not have been anything different.

7 Q. Right, because --

8 A. There would not have been -- the third officer in would
9 not have had a noose. The second officer in would not have
10 had a Taser. The bottom line is that officer had a shotgun.
11 He had to deal with the threat.

12 Q. Okay. And when he's got that shotgun, he's got a split
13 second to make a decision, right?

14 A. Yes.

15 Q. Shoot or don't shoot, right?

16 A. Correct.

17 Q. Now, wasn't Deputy Carroll the first man in during the
18 raid?

19 A. Yes.

20 Q. And, again, you did not instruct Deputy Carroll to use
21 any non-lethal means to restrain the dog?

22 A. Correct.

23 Q. And he had -- Deputy Carroll had to make a split second
24 decision, did he not?

25 A. He did.

1 Q. And again, that split second decision was to shoot or not
2 shoot the dog, correct?

3 A. Correct.

4 Q. And he shot him, did he not?

5 A. He did.

6 Q. Isn't it true, sir, that you told Mrs. Carroll -- that
7 you apologized to Mrs. Carroll for shooting the dog, correct?

8 A. Yes.

9 Q. And you also told her you had no choice?

10 A. Correct.

11 MS. AGOLA: Thank you.

12 MR. FULLER: At this time, Your Honor, I'd like to
13 make the witness my own witness.

14 THE COURT: Go ahead.

15 MR. FULLER: Thank you.

16 DIRECT EXAMINATION

17 BY MR. FULLER:

18 Q. Good afternoon, sir.

19 A. Good afternoon.

20 Q. We will start at the beginning and get some information
21 on you. Can you tell us how old you are?

22 A. Forty-two.

23 Q. And your marital status?

24 A. I am married with two children.

25 Q. And what are their ages?

1 A. My daughter just turned eleven, and my son is eight, soon
2 to be nine.

3 Q. Do you have any pets at home?

4 A. I do.

5 Q. What are they?

6 A. I currently have a 24-pound cat and a guinea pig.

7 Q. And did you ever own a dog?

8 A. I did.

9 Q. What happened to your dog?

10 A. My dog died at the age of 14.

11 Q. And what type was it?

12 A. It was a Sheltie that my wife got as a gift for
13 graduation.

14 Q. Now, can you tell us where you are currently employed and
15 in what capacity?

16 A. I'm currently in the Town of Brighton Police Department.
17 I'm a Sergeant in charge of the Third Platoon.

18 Q. And how long have you been with the Town of Brighton as a
19 police officer?

20 A. Fifteen years.

21 Q. Prior to becoming a police officer with the Town of
22 Brighton, where were you employed?

23 A. I was a Village of Lyons police officer in Wayne County,
24 from September of 1992 to April of '96.

25 Q. And where were you employed prior to serving as a police

1 officer for the Village of Lyons?

2 A. I was in the United States Navy.

3 Q. And what did you do as a member of the U.S. Navy?

4 A. I was a gunners mate.

5 Q. Did you attend any college?

6 A. I attended college schools, but, no, I do not have a
7 degree.

8 Q. Did you attend school through the U.S. Navy?

9 A. Yes.

10 Q. Now, can you tell the jury about your training, as far
11 as, for instance, did you attend the police academy?

12 A. I did.

13 Q. What's some of the training that you had?

14 A. The use of firearms, the use of non-lethal equipment,
15 tactical proceedings, knowledge of Penal Law and Vehicle &
16 Traffic Law. Basically how to conduct yourself as a police
17 officer.

18 Q. All right. And, in addition, did you have criminal
19 investigation training?

20 A. I did.

21 Q. DWI training?

22 A. I did.

23 Q. Now, did your -- have you had training regarding
24 execution of search warrants?

25 A. I have.

1 Q. And was that in tactical warrant school?

2 A. That was one of them, yeah.

3 Q. What was the other one?

4 A. Various in-service training that are sponsored through
5 Monroe County that multiple agencies usually attend together.

6 Q. And could you explain what tactical warrant school was?

7 A. Tactical warrant school, I believe, it's a two-week
8 school that focuses on entries into homes and businesses, how
9 to clear businesses and homes, the proper way to execute
10 search warrants.

11 Q. Have you executed search warrants in the past?

12 A. I have.

13 Q. Approximately how many?

14 A. Several hundred.

15 Q. And you were asked about a no-knock search warrant. Can
16 you explain to the jury what that is and what the need is for
17 it?

18 A. Sure. A no-knock search warrant is authorized by the
19 judge. We request it, and the reason we request it is for
20 the element of surprise. So, when you enter a home, the
21 residents or occupants there, they don't have time to react
22 to destroy evidence.

23 Q. And are you familiar with GRANET?

24 A. I am.

25 Q. Did you become a GRANET member?

1 A. I did.

2 Q. And can you explain how you became a GRANET member?

3 A. Back in September of 2002, I became a member by applying
4 in my Department and submitting a resume to the command staff
5 with my qualifications.

6 Q. And do you know what agencies make up GRANET?

7 A. There are several agencies. From time to time they may
8 stop participation and start again, depending on their
9 manpower.

10 Q. Would those be agencies within Monroe County?

11 A. Yes.

12 Q. And did you see of any extra training by being a member
13 of GRANET?

14 A. Yes. Once in GRANET we had, like, basically a field
15 training investigator with us that would show us different
16 ways to effectively do the job.

17 Q. Now, you mentioned fatal funnel. Can you define that for
18 the jury, please?

19 A. In these schools that I previously mentioned, we are
20 instructed to remove yourself from the fatal funnel. So, the
21 fatal funnel could be a doorway to a bedroom, a doorway to a
22 home. And the reason for that is, statistically, if officers
23 are killed upon entry or shot, they're shot at the doorway.
24 Because if you're a bad guy inside of a home, and you have
25 access to weapons, you would grab that weapon and immediately

1 shoot toward a door; whether you were shooting towards a
2 person or not, it wouldn't matter. But if you shot toward a
3 door, your chances of hitting somebody on entry would be
4 pretty high. So, our job is to get out of that fatal funnel,
5 and we do so expeditiously and in a certain way every time.

6 Q. Do you generally know how many members are on the GRANET
7 team at any one time searching a home?

8 A. On an entry team?

9 Q. On an entry team, I'm sorry.

10 A. Ideally, five to seven.

11 Q. And do they have different responsibilities?

12 A. They do.

13 Q. What are some of those responsibilities?

14 A. One member I assign shotgun, the next member I assign a
15 halo to -- a halo tool is -- if you think like a fireman, you
16 know, the metal spiked tool with a flat head on one side and
17 a spike on another -- another member I assign to ram tool.
18 The ram tool is the breach mechanism used for the door.

19 Q. Now, I'm going to direct your attention to October 11,
20 2006, and ask you if you were a member of the Greater
21 Rochester Area Narcotics Enforcement Team on that date?

22 A. I was.

23 Q. And does GRANET have jurisdiction over the entire Monroe
24 County?

25 A. Yes.

1 Q. On October 11, 2006, were you given responsibility as a
2 GRANET member to execute a court ordered search warrant on
3 the premises of 284 Ridgedale Circle?

4 A. Yes, I was.

5 Q. Was that in the Town of Greece?

6 A. It is.

7 Q. Now, did you have a specific responsibility on that team;
8 you, yourself?

9 A. I would have been referred to as the team leader. The
10 warrant was my responsibility to execute.

11 Q. And approximately 6:45 on October 11, 2006, at 284
12 Ridgedale Circle, were you the person that had the ram tool?

13 A. I was.

14 Q. Now, could you explain to us how you entered the home?

15 A. Based on the court authorized no-knock entry, we would
16 discreetly enter the property of the residence with staying
17 out of sight, basically, or move quickly to the residence, so
18 nobody can look at you through windows and know that you're
19 coming. Once we were what we call stacked on the door,
20 stacked being members as close as they can to each other to
21 where they are actually touching the leg of the other officer
22 that's in the stack, lines up on the door. They either line
23 up on the left side or the right side of the door. Sometimes
24 in front of the door, if there's no way to conceal yourself.

25 Once everybody's in place, my job, with the ram tool,

1 is to breach the door. The first thing I do is, if there's a
2 storm door, I check and see that it's open, unlocked. The
3 interior door, I check with my hand to see if the handle is
4 locked or unlocked. In this particular case, the storm door
5 was unlocked, the actual door to the residence was locked. If
6 the storm door was locked, hence the halo tool I mentioned
7 earlier, we would use to unlock. Then, I strike the door with
8 the ram tool.

9 Q. And how many times did you have to strike this door?

10 A. Once.

11 Q. Did the door thereafter fly open?

12 A. It did. We're trained to strike a door in a specific
13 area of the door that would cause that door on one strike to
14 open. Because, obviously, if you did it more than once, the
15 people inside the residence have more time to react. And in
16 this particular case, once.

17 Q. And once that door flung open, were you able to make any
18 observations?

19 A. I was.

20 Q. And what were those?

21 A. I saw a dog.

22 Q. And where did you see it?

23 A. It was directly in the entrance to the home -- visible
24 from the entrance -- approaching the front door.

25 Q. And thereafter what did you do?

1 A. Once I rammed the door -- I have a ram tool that's very
2 heavy -- I stepped back to the side of the door and allowed
3 the entry team to go in. I'm the last one in, and I throw
4 the ram tool down and wait. Once I struck the door, Deputy
5 Jim Carroll from the Sheriff's Office entered with shotgun.

6 Q. And who assigned him that position?

7 A. I did.

8 Q. And do you recall the second person that entered?

9 A. I do not.

10 Q. Now, once the door is breached, and after, obviously, the
11 noise, do you say anything?

12 A. The person with the shotgun typically says something. I
13 did not.

14 Q. And what is that?

15 A. "Police. Search warrant." Multiple times.

16 Q. How do they say that?

17 A. "Police. Search warrant. Police. Search warrant.
18 Police. Search warrant."

19 Q. So, are they yelling?

20 A. Yes.

21 Q. Did you hear any dog noises after you breached the door?

22 A. I did.

23 Q. What kind of noises did you hear?

24 A. I heard barking, I heard growling, and I could actually
25 hear the dog approach by the -- you know, like the sound a

1 dog makes as it's coming towards you.

2 Q. And can you tell the jury the purpose of letting Deputy
3 Carroll enter the house first?

4 A. To deal with the threat. The shotgun is the ideal weapon
5 to have, to be the first one into the home.

6 Q. And did there come a time when you heard a gunshot?

7 A. I did.

8 Q. Where were you, if you recall?

9 A. To the side of that front door.

10 Q. And do you know who fired that shot?

11 A. Yes.

12 Q. And who was that?

13 A. Deputy James Carroll.

14 Q. Were you able to actually see him do that from your
15 vantage point?

16 A. Yes.

17 Q. Do you know approximately how far the dog was from Deputy
18 Carroll when he shot it?

19 A. About one foot.

20 Q. And can you tell the jury how the dog was acting when you
21 observed it?

22 A. It was vicious. It was not a friendly dog.

23 Q. In your opinion, and based on your observations, was the
24 dog aggressive?

25 A. Yes.

1 Q. Now, when confronted with a vicious dog while making an
2 entry during a no-knock search warrant, can you ever consider
3 retreating?

4 A. No.

5 Q. And why is that?

6 A. That's not an option. You're authorized and told by the
7 court to go serve this warrant. The means to serve this
8 warrant are to not give notice. So, once you enter that
9 house, a dog is starting to attack and slow down your entry
10 team in that fatal funnel, you can't complete your mission.
11 Your mission is to serve the warrant and find whatever the
12 warrant is directed for you to find. And there was not a
13 retreat. A retreat would mean evidence destruction.

14 Q. Now could you tell the jury differences between the
15 situation where it's necessary to shoot a dog and situations
16 where you didn't have to shoot a dog?

17 A. Absolutely. I've been in both. Many of them.

18 Q. Could you relay some of them to us?

19 A. Sure. Situations where you would not have to shoot a dog
20 would be, hopefully the dog does a 180 and runs into a room
21 where you can secure that room. Several occasions I've
22 encountered dogs, large dogs, small dogs, some known to be
23 mean upon entry. Turns out -- once we enter, you have five
24 to seven officers with black fatigues on running into a home.
25 Most dogs are going to retreat, you would hope. But upon

1 retreating, that dog retreats to a room, and we know that
2 that room is clear -- like a closet or a bedroom -- and we
3 can see that there are no people in that room, simply close
4 the door to the room. Call for an Animal Control. Have
5 Animal Control come with a noose to take the dog out.

6 On other occasions we've -- I've dealt with dogs in
7 stairways where a dog just simply sits there, and we go by the
8 dog, and the dog is no threat to anybody. You could picture
9 the types of dogs I'm talking about, but you would simply walk
10 by the dog and it doesn't attack.

11 And I've been on warrants where the officers have
12 yelled, "dog to the left, dog to the left." The dog there's
13 not attacking, no reason to destroy the dog. You know, I've
14 been on warrants where dogs were destroyed. I've been on
15 warrants where dogs have actually ran out of the home after
16 the entry team upon our arrival. I can give you dozens of
17 scenarios good and bad.

18 MR. FULLER: I have no further questions. Thank you,
19 sir.

20 THE WITNESS: Sure.

21 CROSS-EXAMINATION

22 BY MS. AGOLA:

23 Q. Is it true, sir, that you have no training as to whether
24 a dog is friendly or not?

25 A. I have life experience training.

1 Q. That's not what I asked. I asked you if you have formal
2 training by the County of Monroe.

3 A. I didn't hear the formal part.

4 Q. Let me rephrase the question, then. Do you have formal
5 training by the County of Monroe, countywide training, to
6 assist you in determining whether a dog is friendly or not?

7 A. No.

8 Q. And is it reasonable to believe that a dog might want to
9 protect his home from invasions?

10 A. Absolutely.

11 Q. Now, knowing that, isn't it true that you did not assign
12 any member of the entry team on the night in question,
13 October 11, 2006, with the responsibility of restraining the
14 dog?

15 A. That is true.

16 Q. And, sir, you keep saying that this was a no-knock
17 warrant, and that's why, presumptively, there were no plans;
18 is that correct?

19 A. Yes.

20 Q. If it had been a knock warrant, would that have made a
21 difference?

22 A. Yes.

23 Q. How?

24 A. We knock on the door, we would hear a dog barking inside
25 wanting to protect its property. We would simply call Animal

1 Control. "Animal Control, come down, noose up this dog for
2 us." We have all the time in the world.

3 Q. All right, sir. And what if you had known in advance,
4 prior to a no-knock warrant, that there was a dog on the
5 premises? Is it your testimony here today that you would
6 make no advanced plans?

7 A. Correct.

8 MS. AGOLA: Thank you.

9 THE COURT: Anything else, Mr. Fuller?

10 MR. FULLER: Very briefly.

11 REDIRECT EXAMINATION

12 BY MR. FULLER:

13 Q. Sergeant DeSain, in your experience as a police officer,
14 and more specifically, in your experience with the GRANET
15 team serving no-knock search warrants, have you had occasion
16 to observe dogs?

17 A. Yes.

18 Q. Are you able to tell an aggressive dog from a
19 non-aggressive dog?

20 A. Yes.

21 Q. And is one of the concerns for serving the warrant the
22 safety of yourself, other officers and occupants of the home?

23 A. Yes.

24 Q. And do you also have a concern with retrieving evidence
25 before its destroyed?

1 A. I do.

2 MR. FULLER: I have no further questions. Thank you.

3 MS. AGOLA: Nothing, Judge.

4 THE COURT: All right. Mr. DeSain, you may step
5 down. Thank you very much.

6 THE WITNESS: Thanks.

7 THE COURT: Ms. Agola, please call your next witness.

8 MS. AGOLA: Yes. Sergeant Carroll.

9 Sergeant James Carroll ,
10 called herein as a witness, after having first been duly
11 sworn, was examined and testified as follows:

12 THE CLERK: When you are seated, please state your
13 full name and spell your last name for the record.

14 THE WITNESS: James Carroll, C-a-r-r-o-l-l.

15 THE COURT: You may proceed.

16 DIRECT EXAMINATION

17 BY MS. AGOLA:

18 Q. Good afternoon, Sergeant Carroll.

19 A. Yes, ma'am.

20 Q. And you are a deputy with the Monroe County Sheriff's
21 Department?

22 A. I'm a sergeant.

23 Q. You're a sergeant, excuse me. And isn't it also correct
24 that in October of 2006, you were a member of GRANET?

25 A. Yes, ma'am.

1 Q. And it's also a fact that you attended Tactical Warrant
2 School in Monroe County?

3 A. Yes, ma'am.

4 Q. And that's a countywide training?

5 A. Yes.

6 Q. And you have an obligation to follow county policies, do
7 you not?

8 A. Yes.

9 Q. And is it fair to say, also, that as a member of GRANET,
10 that there are no separate policies with regard to the
11 execution of search warrants?

12 A. I'm sorry; try that one more time, ma'am.

13 Q. Sure. As a member of GRANET, do you have a separate
14 policy book?

15 A. Not that I'm aware of.

16 Q. Sir, do part of the policies that you are referring to
17 mandate that you notify your supervisor if you've used lethal
18 force on an animal?

19 A. Yes.

20 Q. And is it fair also to say that you never received any
21 training involving the identification of a friendly or a
22 non-friendly dog?

23 A. Formal training, no.

24 Q. Have you ever received any formal training on how to
25 isolate a dog upon the execution of a search warrant?

1 A. Other than what I've learned in previous warrants.

2 Q. So, it's fair to say there is no formal training with
3 regard to that?

4 A. I don't believe so.

5 Q. So, you've never been trained perhaps to use pepper spray
6 on a dog?

7 A. I've never heard of an episode where pepper spray worked
8 on a dog.

9 Q. How about a catch pole?

10 A. I've seen Animal Control use one.

11 Q. How about a Taser?

12 A. We didn't have Tasers back in '06.

13 Q. All right. Now, prior to the entry into the Carroll
14 residence back in 2006, you were briefed by Officer DeSain,
15 were you not?

16 A. Yes, ma'am.

17 Q. And isn't it true that you knew there was a dog present
18 at the Carroll residence?

19 A. I believe he did tell me that there was a dog at the
20 location.

21 Q. Is it also correct, Sergeant, that there were no specific
22 plans to isolate any dogs that might have been present at the
23 Carroll residence?

24 A. We don't plan on isolating a dog for no-knock search
25 warrant. Again, like Sergeant DeSain said, if it's a knock

1 warrant, we have time on our side, and that's when we come up
2 with other plans. But a no-knock warrant is specifically
3 designed to get the team in out of the fatal funnel. If the
4 dog chooses to retreat, that gives you more time to figure
5 out how you're going to deal with the dog.

6 Q. And where was the briefing held?

7 A. I believe this one was at the Greece police station on
8 Long Pond, but I'm not positive. I believe it was at the
9 Greece police station, though.

10 Q. So, when you entered the Carroll residence, you had to
11 make a judgment call, did you not?

12 A. Yes, ma'am.

13 Q. And that left you essentially without any option but to
14 kill the Carroll dog, in the event that he attempted to guard
15 his home?

16 A. He was making his way at me in a vicious manner. That's
17 when I chose to dispatch the dog.

18 Q. Well, understood. But the question is, was there any
19 other option?

20 A. The way things were laid out at that time, no, there
21 wasn't.

22 Q. And it was a deliberate choice not to create any
23 alternatives, correct?

24 A. We did not have the time to come up with another way to
25 deal with this.

1 Q. Well, when you say you didn't have the time, you knew in
2 advance, did you not?

3 A. Yes, we did.

4 Q. And isn't it true, sir, that you were the first person
5 through the door after the door was breached?

6 A. Yes, ma'am.

7 Q. And Officer Hopper was behind you?

8 A. He was somewhere behind me. I'm not positive if he was
9 the next man or the man after that, but he was behind me.

10 Q. And upon entering the Carroll residence, you saw the
11 Carroll dog making a fast walking approach towards you?

12 A. Correct.

13 Q. And that wasn't a surprise, was it? You knew the dog was
14 there?

15 A. I knew a dog was there, but I wasn't expecting a fast,
16 aggressive approach at me.

17 Q. Who was behind the dog?

18 A. Nobody at the first point of entry.

19 Q. And when you walked into the living room, was there
20 somebody behind?

21 A. Within a couple seconds, as the dog was making his way
22 down the threshold of the hallway, at one point I did see a
23 large female at the end of the hallway.

24 Q. Do you recall telling her, "dog, dog, dog"?

25 A. I recall saying "dog" to the team.

1 Q. Do you recall telling her, "get your dog, get your dog"?

2 A. I never said that.

3 Q. Do you recall telling Ms. Carroll, "step out of the way"?

4 A. I did.

5 Q. When she stepped out of the way, you shot the dog, right?

6 A. Mrs. Carroll was in no position to be able to capture
7 that dog before the dog got to me.

8 Q. That's not my question. My question is, at that point
9 you made the split second decision to shoot the dog, correct?

10 A. There were things that led up to that point, though,
11 ma'am.

12 Q. I'm asking a question. I am just respectfully requesting
13 that you just answer my question.

14 MR. FULLER: Objection, it's argumentative.

15 THE COURT: Overruled.

16 BY MS. AGOLA:

17 Q. Was there a chance that you could have had Ms. Carroll
18 trap the dog in a room?

19 A. Not at this point, no.

20 Q. Did you plan in advance to perhaps negotiate with the
21 owners to place the dog in a room?

22 A. No, ma'am.

23 Q. You shot the dog one time in the head and he collapsed,
24 correct?

25 A. Yes, ma'am.

1 Q. And where were the children in the house at that point?

2 A. They were in a room, I believe, towards the back of the
3 hallway. I never saw children until we were actually
4 clearing the house.

5 Q. Is it fair to say they heard that gunshot?

6 A. Yes.

7 Q. In that split second, Sergeant, isn't it true that you
8 thought that Damian was a Pitbull?

9 A. I did.

10 Q. Isn't it also true that a month prior to the Carroll
11 entry, that you had shot two Pitbulls in Penfield --

12 A. Correct.

13 Q. -- during a search warrant?

14 A. Yes, ma'am.

15 Q. And they attacked you?

16 A. Yes.

17 Q. So, as that Carroll dog quickly approached you, you felt
18 you had no alternative but to shoot it, correct?

19 A. Not until he was about a foot away from me.

20 Q. Where were you exactly in the living room?

21 A. I want to say I was off to the right. If you come in
22 through the door, there's a hallway directly across. It was
23 a living room, but there was a hallway directly across. Off
24 to the right of the living room, I believe there was a
25 kitchen. I was just right of the hallway between the kitchen

1 and the hallway in the living room.

2 Q. And was the dog headed towards you?

3 A. Yes, ma'am.

4 Q. All right. I want to show you what's previously been
5 marked as Plaintiff's Exhibit 2. I will tell you to take a
6 look at it, and when you're ready, identify it for me.

7 A. I'm ready.

8 Q. Okay. Do you know what that is?

9 A. Yes.

10 Q. What is it?

11 A. I believe his name was Damian, the Bullmastiff at the
12 Carroll house that night.

13 Q. And the photograph that's before you is a picture of?

14 A. After I dispatched it.

15 Q. After you dispatched the dog. Okay.

16 THE COURT: Any objection, Mr. Fuller?

17 MR. FULLER: I made previous objections, Your Honor.
18 I believe they were ruled upon.

19 THE COURT: You may publish it to the jury.

20 BY MS. AGOLA:

21 Q. Now, looking at that photo -- and I think there's a
22 screen right there, sir, for you. Is it your testimony that
23 you were inside of that hallway area here (indicating)?

24 A. I believe that was the doorway to the location. The
25 doorway that we came in through.

1 Q. And you breached the doorway, you walked past the
2 doorway?

3 A. I walked past the doorway, yes.

4 Q. And, so, you were standing to the right of the doorway?

5 A. Yes, ma'am. Probably where that vacuum cleaner is.

6 Q. And you said the dog was running towards you, correct?

7 A. Making a fast approach towards me, yes.

8 Q. What's that room to the side?

9 A. I believe that's a kitchen.

10 Q. Isn't it true that his head is pointed towards the
11 kitchen?

12 A. His head, to me, appears to be towards the vacuum
13 cleaner, where I was standing.

14 Q. Is it possible that that dog was running away from you?

15 A. No, ma'am.

16 Q. He was running right towards you?

17 A. Yes, ma'am.

18 Q. And isn't it true that because there was no plan to deal
19 with the dog that you knew was there, you placed yourself in
20 close proximity with Damian?

21 A. It's a no-knock search warrant, ma'am.

22 Q. And what would you have done differently if it was a
23 knock search warrant regarding plans to deal with the animal?

24 A. We probably would have had Animal Control with us, maybe
25 negotiated with Ms. Carroll to put the dog in a room until we

1 can deal with the problem, but that wasn't -- that's not the
2 way it was.

3 Q. What other non-lethal uses of force would you have used
4 in a knock search warrant, as opposed to a no-knock?

5 A. A knock search warrant, what less lethal would I use?

6 Q. Non-lethal.

7 A. I don't think we would have to go to that if we were
8 talking about a knock. We would be negotiating and planning
9 along. I don't see a need to hurt the animal if it was a
10 knock warrant.

11 Q. And I guess my question to you is, are you trained with
12 regard to the use of non-lethal means of restraining a dog?

13 A. I am. No, I'm sorry, not with the dog.

14 MS. AGOLA: Thank you.

15 THE COURT: Mr. Fuller?

16 MR. FULLER: At this time I'd like to make Sergeant
17 Carroll my witness, Your Honor.

18 THE COURT: Yes.

19 MR. FULLER: Thank you.

20 DIRECT EXAMINATION

21 BY MR. FULLER:

22 Q. Good afternoon, sir.

23 A. Good afternoon.

24 Q. You have the same last name Carroll. Are you related in
25 any way to plaintiff, David Carroll?

1 A. No, sir.

2 Q. Anybody in the family?

3 A. No, sir.

4 Q. Are you married?

5 A. Yes.

6 Q. Do you have any children?

7 A. Two. Two boys.

8 Q. And what are their ages?

9 A. Twelve and nine.

10 Q. And do you have any pets?

11 A. I do.

12 Q. Can you tell the jury what your pets are?

13 A. I have a Bichon Havanese lapdog, and we've just recently
14 acquired my son's grammar school fish for the summer.

15 Q. Did you have any pets before that?

16 A. I did. I had a yellow lab named Mac.

17 Q. What happened to Mac?

18 A. I had to put Mac down after 14 years.

19 Q. Can you tell us what your education is?

20 A. I have a high school diploma, a two-year college degree,
21 and hours of police training.

22 Q. In addition, did you go to FBI school?

23 A. I did. I'm a certified bomb technician from the FBI.

24 Q. Where are you currently employed?

25 A. I'm a Sergeant with the Monroe County Sheriff's Office,

1 road patrol and bomb commander.

2 Q. How long have you been employed with the Monroe County
3 Sheriff's Office?

4 A. Twenty-one years.

5 Q. And how long have you held the rank of Sergeant?

6 A. Four.

7 Q. Four years. And when were you promoted?

8 A. 2007.

9 Q. Now, when you first joined Monroe County Sheriff's
10 Department, where were you assigned?

11 A. I started off as a part-time deputy assigned to the
12 Marine Patrol. After that, I went to Henrietta Knife Patrol.
13 There, I was a uniformed crime scene technician for about
14 ten, eleven years, a field training officer, which means I
15 train the recruits after they come out of the police academy,
16 a background investigator for employment for the Sheriff's
17 Office; I conducted an investigation on your past. I was a
18 drill instructor at the police academy for three years, which
19 means I'm a counselor. My job is to help the recruits find
20 their weak points and help them through it, whether it be
21 physically fit or school, book-wise. And again, I'm the
22 commander of the Sheriff's Bomb Squad.

23 Q. And are you familiar with the Greater Rochester Area
24 Narcotics Enforcement Team?

25 A. I am.

1 Q. And can you tell us some of the members of that team, as
2 far as law enforcement agencies?

3 A. East Rochester used to be in it, Irondequoit, the
4 Sheriff's Department, the City of Rochester, Brighton, and I
5 think that's all that's in it now. And Greece. I'm sorry,
6 Greece Police.

7 Q. How do you become a member of GRANET?

8 A. In my department it's kind of difficult to become a
9 member. You have to have some years of on-the-job, a descent
10 reputation with the department, be able to think on your
11 feet, they go through your internal affairs history, make
12 sure that you're not a problem candidate. They want somebody
13 to represent the Sheriff's Department well. You put a resume
14 together, and then you are selected by your command staff.

15 Q. And were you thereafter selected?

16 A. I was selected, yes.

17 Q. And did you receive any additional training?

18 A. I went to Tactical Warrant School.

19 Q. Now, approximately how long did you serve on GRANET?

20 A. Two years, before I was promoted.

21 Q. Now is GRANET a permanent or temporary assignment?

22 A. Temporary assignment.

23 Q. After GRANET where did you go?

24 A. I was promoted to Sergeant, went to C-zone substation,
25 which is the west side of the County, as a patrol supervisor.

1 After that, after about a year of patrol, I was assigned to
2 the Criminal Investigation section of the Sheriff's
3 Department Warrant Unit.

4 Q. And is that the Fugitive Warrant Unit?

5 A. Fugitive Warrant Unit, yes.

6 Q. In addition to that, what other responsibilities did you
7 have?

8 A. I supervise the sex offenders of the Monroe County area,
9 online cyber crimes, crimes against children on the
10 computers, and the financial economic crimes.

11 Q. Were you involved in any Federal task forces?

12 A. I was. I was Assistant Supervisor to the Fugitive
13 Warrant Task Force with the Marshals Office and Assistant
14 Supervisor with the FBI for the Cyber Crime Task Force.

15 Q. We've obviously sat here and heard the explanation of
16 no-knock warrants. Can you tell us what concerns you have in
17 executing no-knock search warrants?

18 A. No-knock search warrants are very dangerous. We
19 generally get the permission -- you have to get the
20 permission of the judge to get it for a no-knock, and you
21 have to specifically lay out your probable cause to show that
22 there's either going to be danger to the officers entering
23 the location, a sufficient risk of evidence being destroyed
24 in the location. So, they are difficult warrants to get.

25 Q. And have you ever encountered dogs?

1 A. Numerous times.

2 Q. And do you recall what kind of dogs?

3 A. I've encountered everything from a Chocolate Lab to a
4 lapdog, German Shepards, Pitbulls. That's pretty much the
5 range of the dogs I'm used to seeing.

6 Q. Now, when you executed these warrants, did all the dogs
7 you encounter attack?

8 A. No.

9 Q. And can you tell us approximately how many times you've
10 been attacked by a vicious dogs while attempting to comply
11 with a no-knock warrant?

12 A. This was the third time.

13 Q. And were you ever injured as a result of a dog attack
14 while executing a warrant?

15 A. I was.

16 Q. And what were your injuries?

17 A. I have sustained a knee injury while being attacked by
18 two Pitbulls on a warrant in Penfield.

19 Q. And did you have to shoot those Pitbulls?

20 A. I did.

21 Q. And did they survive?

22 A. Both of them survived.

23 Q. I'm going to direct your attention, Sergeant, to October
24 11, 2006. Were you working on the GRANET team at that time?

25 A. I was.

1 Q. And how long had you been on GRANET at that time?

2 A. About a year.

3 Q. Did there come a time where you were notified that a
4 County Court Judge signed a court ordered search warrant for
5 the premises located at 284 Ridgedale Circle?

6 A. I was.

7 Q. Is that in the Town of Greece, County of Monroe?

8 A. It is.

9 Q. And were you on the team that was assigned to enter this
10 premises?

11 A. I was.

12 Q. Do you recall some of the agencies that were
13 participating in that particular entry?

14 A. I do.

15 Q. And who were they?

16 A. Officer DeSain from Brighton, Officer Hopper, Sergeant
17 Trowbridge and Sergeant Henderson from Greece, myself from
18 the Sheriff's Department, and I believe Jose Solario from the
19 Rochester Police Department.

20 Q. In addition to entering the house, is there also a
21 perimeter set up outside?

22 A. Yes.

23 Q. And for what purpose is that done?

24 A. For anybody who wants to run outside of the house and
25 take off on foot.

1 Q. And can you tell the jury what position you were
2 assigned?

3 A. I was assigned to the shotgun; first man through the
4 door.

5 Q. And who assigned you that position?

6 A. Officer DeSain.

7 Q. How were you dressed?

8 A. I was dressed in black fatigues, a flack jacket that said
9 "sheriff" on the back and a sheriff star on the front.

10 Q. When you say flack jacket, is that a bullet resistant or
11 bulletproof vest?

12 A. It's a thicker bulletproof vest.

13 Q. Now, do you remember who was in charge of breaching the
14 door?

15 A. Officer DeSain.

16 Q. Do you remember who was directly behind you?

17 A. I don't. I just know the rest of the team was behind me.

18 Q. Okay. And what was the responsibility of your position?

19 A. My job is to provide security for the team as they are
20 approaching. We are all coming into the house. The shotgun
21 is designed to keep everything in front of you safe, while
22 the team splits up into two and hits hallways or rooms off to
23 the area that you're searching. My job is to make sure that
24 nothing comes and surprises us in the front. I provide
25 security in the hallway and get everybody out of the fatal

1 funnel as fast as possible.

2 Q. Now, did you hear any noises emanating from inside the
3 house after Sergeant DeSain breached the door?

4 A. I did.

5 Q. What were those noises?

6 A. A barking dog. A barking, growling dog.

7 Q. Immediately after the door was breached and you stepped
8 in, what did you observe?

9 A. There was a hallway directly across from the room that I
10 was standing in. It was probably about 20 feet long, maybe
11 25 feet long.

12 Q. Now, when you say across, do you mean in front of you?

13 A. In front of me, a 25 feet long hallway. After being in
14 the house for probably a second, I saw the dog coming around
15 the corner and down the hallway towards me.

16 Q. At that time, when you first saw the dog, did you see
17 anybody else?

18 A. No.

19 Q. Can you describe the way the dog was coming toward you?

20 A. He was coming in -- not a run, but a fast pace, direct
21 movement towards me. He wasn't hesitating. He was showing
22 me his front teeth, and growling, and barking at the same
23 time.

24 Q. And did there come a time when you saw somebody else in
25 the hallway?

1 A. Yes.

2 Q. How many other people did you see?

3 A. One woman.

4 Q. And where was she in relation to the dog?

5 A. She was probably 10-15 feet behind the dog.

6 Q. And can you describe that woman?

7 A. She was a large female, white.

8 Q. Was she adult?

9 A. Yes.

10 Q. Now, after observing the large dog acting in an
11 aggressive manner, what did you do?

12 A. I notified the team, "dog." The dog was still making an
13 approach. As he was getting closer to me, I could realize
14 that he wasn't going to retreat or back off. I lowered my
15 shotgun down on him, again, announced, "dog, dog, dog," at
16 which time I saw the female coming down the hall faster, but
17 she was still quite a ways away from the dog. This wasn't an
18 opportunity where she could grab the dog, because he was
19 right on me. There was a bedroom off to my left -- I'm
20 sorry; a room off to my left in the hallway that I'm talking
21 about. I ordered the woman to get into the hallway. She did
22 comply and at that time I took the shot.

23 Q. Before -- immediately before you took the shot, did you
24 have to do anything?

25 A. I had to get the woman out of the hallway.

1 Q. And did you take the shot straight on or did you move?

2 A. I tilted off to the left -- I'm sorry, my right. I had
3 to lower the shotgun down, because the dog was literally
4 within a foot, if less, to my leg, and I fired in a downward
5 direction for two reasons; I didn't want any of the spray of
6 the shotgun to go down the hallway. I had to make sure my
7 backdrop was clear so nobody else would get hurt.

8 Q. Why did you wait so long before dispatching the dog?

9 A. Because I couldn't get Ms. Carroll out of the hallway.

10 Q. And could you show us or describe the angle of the
11 shotgun?

12 A. It was pointed downward (indicating).

13 Q. So, you are indicating the barrel was downward. The back
14 part of the stock is up?

15 A. The stock is up towards my shoulder and the barrel is
16 probably a foot off my foot.

17 Q. Do you recall where you shot the dog?

18 A. I shot him in, I believe, the eye.

19 Q. How many times did you shoot him?

20 A. Once.

21 Q. What gauge was that shotgun?

22 A. Twelve-gauge tactical buckshot.

23 Q. Why do you use buckshot?

24 A. It's a slower round. It's designed not to go through
25 walls. It's a slow round, so less chance of hurting people

1 with frag or -- frag from the gun.

2 Q. And is buckshot a standard issue for search warrant
3 ammunition?

4 A. Yes.

5 Q. Now, in your opinion, and based on your observations and
6 experience, was the dog acting aggressively when you
7 encountered it?

8 A. Yes.

9 Q. Did you believe that it caused you or other members
10 physical injury, potentially?

11 A. Yes.

12 Q. Now, do you ever have a consideration to stop the warrant
13 team or retreat?

14 A. It's not an option for tactical warrant service. Once
15 you've gained this momentum and you've gained your ground,
16 you can't give it back up. It gives the suspects a chance to
17 arm themselves or destroy evidence that could be in the
18 house.

19 Q. Now, during your years of police service, approximately
20 how many times have you encountered dogs during a search
21 warrant?

22 A. Probably 20 or 30 times.

23 Q. And approximately how many times was it necessary to
24 shoot the dog?

25 A. Three.

1 Q. Can you explain the differences to the jury between times
2 when it was necessary to shoot a dog and times when it
3 wasn't?

4 A. Yes. We've had times where the dog just ran away, which
5 is obviously the best case scenario. We've also negotiated
6 where the owner was able to grab the dog, and we negotiated
7 the dog into a room, a bathroom, somewhere where we can
8 secure the dog until we're done searching the house. We've
9 had dogs just lay right down. I know of one case where a
10 German Shepard ran out through a window and just ran down the
11 street. These were all occasions where, obviously, we didn't
12 feel it was needed to shoot the dog.

13 Q. Would you do anything different if you know there's a dog
14 on the premises versus not knowing there's a dog on the
15 premises?

16 A. On a no-knock warrant there's no difference.

17 Q. And why is that?

18 A. Again, we use the element of surprise to our advantage,
19 whether there's bad armed people in the location or at the
20 risk of destroying evidence.

21 Q. Did you know that there was a vicious dog in the house at
22 284 Ridgedale Circle on October 11, 2006?

23 A. I believe I was briefed that there was a dog.

24 Q. Did you know the dog would be vicious?

25 A. I did not.

1 Q. Did you know that dog would attack you?

2 A. No, I did not.

3 Q. Were you planning on intentionally killing a dog that
4 day?

5 A. Absolutely not.

6 Q. Now, when a firearm is discharged in any situation
7 involving a law enforcement officer in the line of duty, is
8 there some type of investigation?

9 A. Yes.

10 Q. And was there one done in this case?

11 A. There was.

12 Q. And what was the outcome?

13 A. I was cleared of any wrongdoing at the scene.

14 MR. FULLER: At this time, Your Honor, I'm showing
15 the Plaintiff's attorney Defendant's Exhibit No. 400, Defense
16 Exhibit No. 401, Defense Exhibit No. 402. I'd like to enter
17 them into evidence at this time.

18 THE COURT: I believe, Ms. Agola, you have no
19 objection to the admission of 400, 401 or 402?

20 MS. AGOLA: No, I do not.

21 THE COURT: All right. Defense Exhibits 400, 401 and
22 402 are admitted.

23 MR. FULLER: I have no further questions. Thank you,
24 sir.

25 CROSS-EXAMINATION

1 BY MS. AGOLA:

2 Q. Sergeant, if you had known in advance that there was a
3 dog present in a knock search warrant scenario --

4 A. In a knock, ma'am?

5 Q. Yes, in a knock. How would you have planned the entry
6 team?

7 A. On a knock search warrant, we generally have --

8 MR. FULLER: I'm going to object, based on the
9 relevance, Your Honor, and speculation.

10 THE COURT: Overruled. You may answer the question.

11 THE WITNESS: I'm sorry, ma'am. On a knock search
12 warrant what would I have done differently?

13 BY MS. AGOLA:

14 Q. Well, you said here today you have many years of
15 experience, and you've testified that you've been in many
16 execution search warrants and many residences, correct?

17 A. Yes, ma'am.

18 Q. And why don't I break it down this way. How many of
19 those warrants that you've just testified to were knock
20 warrants?

21 A. I don't know.

22 Q. Is it fair to say that you wouldn't know how many are
23 no-knock?

24 A. Correct.

25 Q. So, I guess what I'm having a difficulty understanding is

1 what prohibits you as a police officer from designating
2 someone on the entry team to provide some form of non-lethal
3 means of restraining an animal on a no-knock warrant?

4 A. I don't know who makes the policies for less lethal
5 weapons for a no-knock warrant. GRANET does not use them. I
6 believe that some of the data shows that less lethal devices
7 do not work well on more vicious dogs.

8 Q. So, sir, are you just simply telling me that you're not
9 trained to use non-lethal means of restraining a dog?

10 A. We do not use less lethal means on a vicious dog.

11 Q. And my question was, are you trained to use --

12 A. No.

13 MS. AGOLA: Thank you.

14 THE COURT: Anything else, Mr. Fuller?

15 MR. FULLER: Very briefly.

16 REDIRECT EXAMINATION

17 BY MR. FULLER:

18 Q. Sergeant, are you trained to enter into homes?

19 A. Yes.

20 Q. And are you given training through Monroe County
21 Sheriff's Office?

22 A. Yes.

23 Q. And training through the Greater Rochester Area Narcotics
24 Enforcement Team?

25 A. Yes.

1 Q. And does that involve the use of deadly weapons?

2 A. Yes.

3 Q. And do you have experience in using your discretion with
4 entering homes during search warrants?

5 A. Yes.

6 Q. And approximately how many search warrants did you say
7 you served?

8 A. Probably over 100.

9 MR. FULLER: I have no further questions.

10 RECROSS EXAMINATION

11 BY MS. AGOLA:

12 Q. And you just made reference, sir, to discretion?

13 A. Yes.

14 Q. And isn't that discretion, more or less, the ability in a
15 split-second scenario to make a decision shoot or don't
16 shoot?

17 A. I don't know if you call it discretion, but, yes, you
18 have seconds to make the decision.

19 MS. AGOLA: Thank you.

20 MR. FULLER: One more, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. FULLER:

23 Q. And Sergeant, that discretion or that decision, is that
24 based on your experience as a police officer, police
25 sergeant, a member of GRANET, and the person that served over

1 100 search warrants?

2 A. Yes.

3 Q. Is it also based on your experience and observations of
4 vicious dogs versus non-vicious dogs?

5 A. Correct.

6 Q. And is it also based on your experience of being attacked
7 in the past and injured by a vicious dog?

8 A. Correct.

9 MR. FULLER: Thank you.

10 RE CROSS EXAMINATION

11 BY MS. AGOLA:

12 Q. And when we make a distinction between vicious and
13 non-vicious dogs, is it fair to say you received no formal
14 training with regard to how to make that determination?

15 A. Formal, no, but life experience, I think I know what a
16 vicious dog is.

17 Q. I believe you testified to that. My question is, did you
18 receive formal training on how to make a distinguishment
19 between a vicious and a non-vicious dog?

20 MR. FULLER: Objection; asked and answered.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: No, I do not believe I've received
23 training on identifying a vicious dog. Formal training.

24 MS. AGOLA: Thank you.

25 THE COURT: Are you done?

1 MR. FULLER: Yes, Judge.

2 THE COURT: All right. Thank you.

3 THE WITNESS: Thank you, ma'am.

4 MS. AGOLA: I call Sergeant Scott Walsh to the stand.

5 Sergeant Scott Walsh ,

6 called herein as a witness, after having first been duly

7 sworn, was examined and testified as follows:

8 THE CLERK: Please be seated. When you are seated,
9 please state your full name and spell your last name for the
10 record.

11 THE WITNESS: Scott Walsh, W-a-l-s-h.

12 DIRECT EXAMINATION

13 BY MS. AGOLA:

14 Q. Good afternoon. Is it Sergeant?

15 A. Investigator Sergeant.

16 Q. Investigator, okay. So, it's Investigator Walsh?

17 A. Investigator Sergeant.

18 Q. Investigator Sergeant Walsh. Sorry.

19 A. That's okay.

20 Q. How are you this afternoon?

21 A. Good. Thank you.

22 Q. How long have you been with the Sheriff's Department?

23 A. I'm in my twenty-fifth year.

24 Q. And what is your role there?

25 A. Currently, I supervise the Major Crimes Unit, the

1 Technicians Unit, the Economics Crimes Unit and Arson
2 Investigation Unit.

3 Q. Do you have any experience with regard to the execution
4 of search warrants?

5 A. I do.

6 Q. And what is your role with regard to that?

7 A. I supervise the execution of search warrants for the
8 various members of my units that actually do the executions,
9 and I participated in search warrants on several occasions.

10 Q. And did you do any training with regard to those search
11 warrants; executions of the search warrants?

12 A. I've attended training regarding those.

13 Q. And here, today, as an Investigator Sergeant, are you
14 fully familiar with those policies?

15 A. I believe I am.

16 Q. Okay. And why don't you tell us -- tell the ladies and
17 gentlemen of the jury, what is the policy with regard to the
18 execution of search warrants, if officers know in advance
19 that there is a dog at the residence?

20 MR. FULLER: Objection, Your Honor. Are we talking
21 about knock or no-knock?

22 THE COURT: Overruled. Is there a policy on that
23 issue?

24 THE WITNESS: I'm sorry, could you repeat it?

25 MS. AGOLA: Sure.

1 BY MS. AGOLA:

2 Q. Would you kindly tell the ladies and gentlemen of the
3 jury, what is the policy in the County of Monroe with regard
4 to the execution of search warrants if officers know in
5 advance that there's a dog present at the residence?

6 THE COURT: Is there a policy regarding the execution
7 of search warrants, if the officers know in advance there's a
8 dog at the residence?

9 THE WITNESS: There's not a specific policy, no.

10 BY MS. AGOLA:

11 Q. Okay. Is it fair to say that -- strike that.

12 Is there a policy at all?

13 A. It's up to the individual supervisor briefing the warrant
14 team. That is always one of the considerations that is
15 actually asked and addressed.

16 Q. And isn't that because the person who is conducting the
17 briefing has to make the members of the entry team aware of
18 any potential dangers on the scene?

19 A. Correct.

20 Q. And one of those potential dangers might be a dog intent
21 on protecting his realm?

22 A. Dogs, children, correct. A lot of things come up during
23 these that members are made aware of.

24 Q. Are officers trained at the County to recognize whether a
25 dog is vicious or not?

1 A. It's discussed. I don't know if they are specifically
2 trained in it.

3 Q. Okay. Is there a formal policy with regard to that?

4 A. With regard to --

5 Q. Recognizing a vicious dog.

6 A. I don't believe we have a formal policy on that, no.

7 Q. Is there a policy with regard to the use of lethal force
8 against an animal?

9 A. There is.

10 Q. And can you briefly describe what that policy is?

11 A. The dog has to be a danger to the individual officer or
12 others.

13 Q. Is there a policy with regard to the use of non-lethal
14 force against animals?

15 A. I've never read one on non-lethal force, no.

16 Q. And would you characterize -- in your many years of
17 experience, would you characterize the custom for sheriffs at
18 the County, that when they encounter a dog at a residence,
19 that they have some latitude of discretion, some level of
20 discretion to make a split-second decision?

21 A. You're asking me to characterize?

22 Q. Is it fair to characterize the custom as being --
23 enabling the officers at that point to make a split-second
24 decision?

25 A. I believe the order that we're referring to, the use of

1 firearms and deadly physical force, states that it is up to
2 the officers individual discretion. They have to justify
3 their use of that deadly physical force.

4 Q. And, so, when they might engage or encounter an animal,
5 they have to think, shoot or don't shoot, right?

6 A. Correct.

7 MS. AGOLA: Thank you.

8 MR. FULLER: I have no questions. Thank you.

9 THE COURT: All right. Mr. Walsh, you may step down.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: It's getting a little warm in here. Why
12 don't we take a break, not that it will be any cooler when we
13 come back. We will use that as an excuse to take a break, and
14 we will resume in about 15 minutes.

15 Remember not to discuss the case and don't begin your
16 deliberations.

17 (The jury was excused.)

18 (Outside the presence of the jury.)

19 THE COURT: We are zipping right along. You have one
20 more witness?

21 MS. AGOLA: Yup.

22 THE COURT: And, Paul, you better figure out how to
23 run the video machine on this break.

24 MR. FULLER: Today, Judge?

25 THE COURT: Yeah. I think we will finish with

1 Christina, we will take a break, and then we will come back
2 and you will run the video, and then we will be done for the
3 day. And we will have a charging conference in the morning
4 and you can sum up tomorrow.

5 (Recess at 2:08 p.m., until 2:26 p.m.)

6 THE COURT: Christina, are you ready?

7 MS. AGOLA: Yes.

8 THE COURT: We are ready for the jury.

9 (The jury was brought in.)

10 THE COURT: Ms. Agola, you may call your next
11 witness.

12 MS. AGOLA: I call my final witness to the stand, and
13 that is Mr. Carroll.

14 THE COURT: David Carroll, please step forward here.
15 Place your left hand on the Bible and raise your right hand.
16 David Carroll ,
17 called herein as a witness, after having first been duly
18 sworn, was examined and testified as follows:

19 THE CLERK: Please be seated. When you're seated,
20 please state your full name and spell your last name for the
21 record.

22 THE WITNESS: My name is David Carroll,
23 C-a-r-r-o-l-l.

24 THE COURT: Good afternoon, Mr. Carroll.

25 THE WITNESS: Same to you.

1 DIRECT EXAMINATION

2 BY MS. AGOLA:

3 Q. Good afternoon, Mr. Carroll. How are you?

4 A. Pretty good.

5 Q. Can you please tell the ladies and gentlemen of the jury
6 how old you were back in October of 2006?

7 A. Twelve.

8 Q. How old are you now?

9 A. Seventeen.

10 Q. Do you recall when your family first obtained Damian?

11 A. Six months before he died.

12 Q. And did you name him Damian?

13 A. Yeah.

14 Q. Why?

15 A. Me and my mom. Both my brothers have the same first
16 initial as me, which is "D", and the dog was like a brother
17 to us, so we named him Damian, because it started with a "D".

18 Q. What are the names of your other two brothers?

19 A. Derrick and Devan.

20 Q. Did you have a nickname for Damian?

21 A. Meatball.

22 Q. Meatball?

23 A. Yeah.

24 THE COURT: Mr. Carroll, try to keep your voice up so
25 the jury can hear you.

1 BY MS. AGOLA:

2 Q. Do you recall where your family obtained Damian from?

3 A. In the City somewhere. I'm not sure where.

4 MS. AGOLA: I'm having a difficult time hearing him.

5 THE COURT: Just keep your voice up.

6 BY MS. AGOLA:

7 Q. What sort of breed was he?

8 A. Bullmastiff.

9 Q. And do you recall how big he was back in October of 2006?

10 A. Like two feet tall, 50 pounds.

11 Q. At the time he died, how old was he?

12 A. Between six and eight months.

13 Q. Where was the dog kept?

14 A. In the house.

15 Q. And what sorts of activities did Damian engage in with
16 your family?

17 A. Just going on walks and running with him. We used to
18 play around with him in the backyard.

19 Q. How much of the day did you spend with him?

20 A. Like two-thirds of the day I would be with him.

21 Q. Was he playful?

22 A. Yeah.

23 Q. Was he curious?

24 A. Yeah.

25 Q. Was he sociable?

1 A. Yeah.

2 Q. Was he aggressive?

3 A. No.

4 Q. Was Damian ever picked up by Animal Control?

5 A. No.

6 Q. Did anyone ever complain to you in the neighborhood about
7 him?

8 A. No.

9 Q. About his barking?

10 A. No.

11 Q. Did he ever bite anybody?

12 A. No.

13 Q. Where were you the night of October 11, 2006?

14 A. In the back room of my house.

15 THE COURT: Mr. Carroll, this is important, so try to
16 lean in, speak into the microphone, and try to keep your voice
17 up so the jury can hear you.

18 BY MS. AGOLA:

19 Q. And was the dog with you?

20 A. Yes.

21 Q. And were you watching TV?

22 A. Yes.

23 Q. And did you hear a gunshot?

24 A. Yeah.

25 MR. FULLER: I object to the leading nature of the

1 questions, Your Honor.

2 THE COURT: Try to ask them in a non-leading fashion.

3 BY MS. AGOLA:

4 Q. Did you hear any significant sounds that evening?

5 A. Yeah.

6 Q. What did you hear?

7 A. A loud, like, explosion sound.

8 Q. What else did you hear?

9 A. My dog making like a yelping sound, crying sound. Like a
10 loud pitched, like -- I can't really describe it. A yelp.

11 Q. Did you see Damian after he was shot?

12 A. Yeah, like, about 15 minutes after he got shot.

13 Q. And what did you see?

14 A. Him laying on the ground, and I saw the blood on the
15 ground around his head.

16 Q. What were you feeling at that point?

17 A. Sick to my stomach.

18 Q. Do you miss the dog?

19 A. Yeah.

20 MS. AGOLA: Thank you.

21 CROSS-EXAMINATION

22 BY MR. FULLER:

23 Q. Good afternoon, sir.

24 A. Same to you.

25 Q. Can you speak up a little bit?

1 A. Yeah.

2 Q. Now, you indicated that you don't know where Damian was
3 purchased?

4 A. No.

5 Q. Was it the City of Rochester, though?

6 A. Yes.

7 Q. And what breed did you indicate Damian was?

8 A. Bullmastiff.

9 Q. Isn't it true -- well, first of all, do you remember
10 testifying July 29, 2009, in an examination before trial?

11 A. I recall being there, yeah.

12 Q. I asked you questions, other attorneys asked you
13 questions?

14 A. Yeah.

15 Q. And you swore to tell the truth at that time, correct?

16 A. Yes.

17 Q. And the testimony you gave at that time was the truth?

18 A. Yes.

19 Q. Certainly. Do you recall stating that -- to the
20 question -- and this, counsel, would be page 17 of his
21 deposition, and that would be line 15 and 16. The question
22 would be, "Do you know what kind of dog he was?" Referring
23 to Damian. And your answer was, "Pitbull Mastiff."

24 Do you recall that?

25 A. No, I don't.

1 Q. You do recall testifying at the deposition, correct?

2 A. Yes.

3 Q. And being asked questions?

4 A. Yes.

5 Q. Do you recall being asked, "Who decided on the name? Why
6 did you name him Damian?" And your answer was, "I don't
7 know. It just sounded like a good name."

8 A. No, I don't remember that.

9 Q. But today you're testifying that you named him Damian
10 because of the "D"?

11 A. Yes.

12 Q. But you don't remember in July saying you just picked
13 that because it sounded like a good name?

14 A. No, I don't.

15 Q. Isn't it true after the dog was shot it died instantly;
16 there was no noise, there was no yelping?

17 A. I heard a yelp come from him.

18 Q. You're stating you heard yelping?

19 A. Yes.

20 Q. Did you also previously state that you were in the
21 hallway?

22 A. Yes.

23 Q. Do you recall that?

24 A. Yes.

25 Q. Isn't it true you were never in the hallway, it was your

1 mother, Sherry Carroll, who was in the hallway?

2 A. I was behind my mom.

3 Q. You were behind your mom?

4 A. Yes.

5 Q. Isn't it true when you testified previously that you
6 never testified that your mom was in the hallway at all,
7 correct?

8 A. Correct.

9 Q. As a matter of fact, you testified that you were holding
10 the dog in your arms and bent down by the dog. Do you
11 remember that testimony?

12 A. Yes.

13 Q. That wasn't true, was it, sir?

14 A. It was true.

15 Q. Isn't it true that the officers that looked down the hall
16 saw just the dog, and then your mother behind the dog; that
17 you were not there?

18 A. Possibly.

19 Q. And isn't that a fact because you weren't there?

20 A. I was in the hallway. I was behind my mom.

21 Q. You indicated during your deposition, basically, that the
22 officer was screaming to you, "let go of the dog, let go of
23 the dog", and you had the dog by the collar.

24 Isn't it a fact you never had that dog by the collar?

25 A. Yes.

1 Q. So, you weren't being honest at your deposition, correct?

2 A. I must not have been.

3 Q. And that was July 29, 2009 that you were under oath?

4 THE COURT: Is that a question?

5 MR. FULLER: Yes.

6 BY MR. FULLER:

7 Q. Were you under oath? Do you remember that?

8 A. I don't recall being put under oath, no.

9 Q. Would it make a difference to you if you swore to tell
10 the truth or you didn't?

11 A. Yes.

12 Q. So, if you don't recall being under oath, that would be
13 an excuse for you not to tell the truth?

14 A. I wouldn't have lied if I did in the first place, if I
15 was under oath.

16 Q. Well, what's correct then? Did you, in fact, have the
17 dog by the collar in the hall as the police were yelling to
18 you, "let go of the dog"?

19 A. No, I didn't.

20 Q. So, you weren't even there, correct?

21 A. I was in the hallway.

22 Q. Do you recall stating that you were holding the dog with
23 both your arms around him, and were actually squatting and
24 kneeling down. Do you recall that?

25 A. No.

1 Q. You don't recall?

2 A. No.

3 Q. Do you recall stating that you were holding the dog by
4 the collar, you picked the dog up in your arms, you bent down
5 and grabbed him, and you cradled him in your arms. Do you
6 recall that?

7 A. No.

8 Q. But it's your testimony today none of that ever happened?

9 MS. AGOLA: Objection. He didn't testify to that.
10 He didn't testify to any location.

11 MR. FULLER: I believe he said he wasn't --

12 THE COURT: Overruled.

13 BY MR. FULLER:

14 Q. Isn't it true you never saw the dog shot at all?

15 A. I didn't.

16 Q. You didn't purchase Damian, did you?

17 A. My mother did.

18 Q. You don't know how much the dog cost?

19 A. No, I don't.

20 Q. You didn't know where the dog was purchased, other than
21 the City of Rochester, correct?

22 A. Yeah, correct.

23 Q. Pardon?

24 A. Correct.

25 Q. Isn't it true the dog was never neutered?

1 A. I believe so.

2 Q. Do you believe he was never neutered or he was neutered?

3 A. He was never.

4 Q. He was never neutered. And you never took the dog to the
5 vet, correct?

6 A. My mom has before. I know he went to the vet for shots
7 and stuff.

8 Q. You personally never took him anywhere?

9 A. No.

10 Q. Never bought him food?

11 A. No.

12 Q. Your family had dogs prior to and after Damian; isn't
13 that true?

14 A. Yes.

15 Q. And mostly those were all Pitbulls?

16 A. We've had Golden Labs, we've had different kind of dogs.

17 Q. For the most part, they were Pitbulls, weren't they?

18 A. Yes.

19 Q. And do you recall you had dogs named Goliath, Tia and
20 Right Eye?

21 A. Yes.

22 Q. Do you recall those dogs? Do you recall what happened to
23 those dogs?

24 A. We got rid of them, and two of them were puppies.

25 Q. Isn't it true Greece Police had to take them away after

1 your father requested they be euthanized?

2 A. Yes.

3 Q. Because they attacked your mother? "They turned vicious
4 and attacked your mother for no apparent reason"?

5 A. No.

6 Q. That, "they were vicious in nature and unpredictable."

7 Isn't it true that's what your father told Greece Police?

8 A. No.

9 Q. These were dogs you had after Damian?

10 A. Yes.

11 Q. Three of them?

12 A. Yes.

13 Q. And all three of them were euthanized?

14 A. No. Two of them were puppies, and we got rid of one of
15 them.

16 Q. So, you have the other two is what your testimony is?

17 A. No, we have none of them now. We had three other
18 puppies.

19 Q. Isn't it true that one of them also bit your father
20 before they attacked your mother?

21 A. No.

22 Q. January 22, 2009, these three dogs were destroyed, based
23 on your father's call to Greece Police, because they attacked
24 your mother; isn't that true, sir?

25 A. No, my mom called to get the dogs picked up.

1 Q. Now, when the team made its entry, did you hear that
2 noise?

3 A. Which noise?

4 Q. The noise of the door being broken down.

5 A. Yes.

6 Q. Sir, I'm going to show you what's been marked as Defense
7 Exhibit No. 406 for identification. Do you recognize that?

8 A. Yes.

9 Q. Can you tell the jury what that is?

10 A. The front door to my house.

11 Q. And does that front door to your house have a mark in it,
12 damaged condition?

13 A. Yes.

14 Q. Is that a fair and accurate representation of the front
15 door to your house --

16 A. Yes.

17 Q. -- as it appeared after October 11, 2006?

18 A. Yes.

19 Q. And Exhibit No. 407 for identification, that's obviously
20 a photograph. Could you tell us what that depicts?

21 A. The hallway and front room to my house.

22 Q. And is that the front door to your house --

23 A. Yes.

24 Q. -- at the end of the picture?

25 A. Yes.

1 Q. Other than that gate, because that gate wasn't there on
2 October 11th, right?

3 A. Yes.

4 Q. Other than that gate and the woman in the hallway, is
5 that a true and fair and accurate representation of your
6 hallway facing the front door as it appeared on October 11,
7 2006?

8 A. Yes.

9 Q. And Defendant's Exhibit No. 408, is that just a closer
10 depiction of what was shown in 407?

11 A. Yes.

12 Q. And same with photograph 409 for identification, is that
13 an even closer depiction?

14 A. Yes.

15 Q. And are all these photographs true, fair and accurate
16 representations of how the inside of your home and your door
17 looked on October 11, 2006?

18 A. Yes.

19 MR. FULLER: At this time, Your Honor, I'd like to
20 enter them into evidence.

21 THE COURT: Any objection?

22 MS. AGOLA: No.

23 THE COURT: 406, 407, 408 and 409 are admitted.

24 BY MR. FULLER:

25 Q. Now, 409 that's now in evidence -- and again, you've

1 testified that gate was not there. Does that show your
2 living room area?

3 A. Yes.

4 Q. And is that the area where Damian was shot?

5 A. Yes.

6 Q. And with regard to 407, is that the hallway that Damian
7 was walking down?

8 A. Yes.

9 Q. And he was walking down toward your front door, correct?

10 A. Yes.

11 MR. FULLER: I have no further questions. Thank you
12 very much.

13 THE WITNESS: Yup.

14 THE COURT: Ms. Agola, any further questions?

15 REDIRECT EXAMINATION

16 BY MS. AGOLA:

17 Q. Mr. Carroll, your mother was ahead of you; is that
18 correct?

19 A. Yes.

20 Q. And did you hear the officers say anything to your
21 mother?

22 A. I heard them tell her to step out of the way.

23 Q. Now, at that point, had you stepped out of the way, too?

24 A. Yeah. I was in the bedroom that she just came out of.

25 Q. And your testimony here today is that you did not see

1 this dog be shot?

2 A. No, I heard it.

3 Q. But you heard it?

4 A. Yeah, and I saw the flash.

5 Q. And then, after the dog was shot, you did see the dog on
6 the living room floor dead?

7 A. Yes.

8 MS. AGOLA: Thank you.

9 MR. FULLER: Nothing.

10 THE COURT: Mr. Carroll, thank you. You may step
11 down.

12 Ms. Agola, anything else?

13 MS. AGOLA: No, the Plaintiff rests.

14 THE COURT: All right. Ladies and gentlemen, that
15 includes the proof that is being offered by Mr. Carroll by his
16 attorneys, and it's customary that we take a brief recess. We
17 will recess for probably about 15 minutes. After the recess I
18 would expect that the defense will present their case. And
19 Mr. Fuller, you have one video deposition, right?

20 MR. FULLER: I have it, Your Honor, whether we play
21 it or not --

22 THE COURT: We are having a few technical
23 difficulties, so I expect we will have you back in 15 minutes
24 with a video for you to watch. If we're a few minutes more
25 than that, we're trying to work out technical glitches.

1 JOSEPH HOPPER - DX BY MR. FULLER

10:13:25 2 announcing ourselves, "Police, search warrant, police,
10:13:30 3 search warrant," very loudly.

10:13:31 4 Q. Who did that?

10:13:31 5 A. I know I did. And I know that Officer --
10:13:36 6 or, I'm sorry, Deputy Carroll did as well.

10:13:38 7 Q. Okay.

10:13:39 8 A. Mainly it's all members of the team, but I
10:13:42 9 can speak for myself and Deputy Carroll.

10:13:44 10 Q. All right. Now, while you and Deputy
10:13:46 11 Carroll were yelling words to the effect of "Police,
10:13:48 12 search warrant," did you observe anything inside the
10:13:50 13 house?

10:13:51 14 A. Once -- yes. Once we breached the door --
10:13:54 15 Deputy Carroll entered; I entered second -- a dog
10:13:57 16 appeared directly in front of Deputy Carroll in a
10:14:01 17 hallway.

10:14:02 18 Q. Can you describe the dog, to the best of
10:14:05 19 your memory?

10:14:05 20 A. It was a very large dark-colored dog.

10:14:08 21 Q. Okay. And how was the dog acting?

10:14:11 22 A. Aggressive. Barking, showing its teeth,
10:14:14 23 just in an aggressive manner.

10:14:16 24 Q. What happened at that point?

10:14:17 25 A. At that point, from the time we saw the

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JOSEPH HOPPER - DX BY MR. FULLER

10:14:21 2 dog, the dog kind of entered into the hallway straight
10:14:25 3 in front of us. Deputy Carroll started yelling, "Get
10:14:30 4 your dog, get your dog."

10:14:33 5 A female then -- the dog entered the
10:14:38 6 hallway. Then a female almost directly after that
10:14:42 7 entered the hallway, right behind the dog way -- or
10:14:45 8 right behind the door -- the dog.

10:14:46 9 The dog then began kind of coming at us in
10:14:53 10 an aggressive manner. Deputy Carroll began yelling to
10:14:56 11 the female, "Get your dog, get your dog." The dog did
10:15:01 12 nothing but continue to charge at the front door,
10:15:05 13 Deputy Carroll.

10:15:06 14 Deputy Carroll then kind of sidestepped.
10:15:10 15 And he said, "Step out of the way, step out of the
10:15:13 16 way," yelling to the female -- or yelling down the
10:15:16 17 hallway to step out of the way. Again, Deputy Carroll
10:15:19 18 sidestepped just prior to the dog, you know, getting
10:15:23 19 to Deputy Carroll's location. He fired one round into
10:15:27 20 the dog with a shotgun.

10:15:29 21 Q. Now, where was this person, this civilian,
10:15:35 22 in relation to the dog when you first saw her?

10:15:38 23 A. She was directly behind the dog. It was a
10:15:42 24 hallway and the dog was first and then the female.

10:15:47 25 Q. Okay. Was anyone else in the hallway?

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:15:49 2 A. No.

10:15:49 3 Q. Now, did you testify you saw Sherry
10:15:54 4 Carroll -- did you know her by name on October 11th,
10:15:57 5 2006?

10:15:57 6 A. Yes, I did.

10:15:57 7 Q. And had you ever seen her before that
10:15:59 8 date?

10:16:00 9 A. Yes, I had.

10:16:00 10 Q. And when you saw her in the hallway, did
10:16:03 11 you recognize her?

10:16:03 12 A. Yes.

10:16:04 13 Q. And did you know her name?

10:16:05 14 A. Yes.

10:16:06 15 Q. Okay. Did you ever see a child in the
10:16:08 16 hallway when you entered the house before the dog was
10:16:10 17 shot?

10:16:10 18 A. I did not.

10:16:12 19 MR. FULLER: No further questions.

10:16:13 20 CROSS-EXAMINATION BY MS. AGOLA:

10:16:13 21 Q. Okay. Officer, how far was the dog
10:16:17 22 approximately before Deputy Carroll -- before he shot
10:16:21 23 him? Could you estimate for us?

10:16:23 24 A. I would estimate -- again, I don't know
10:16:29 25 exactly, but I would estimate 10 feet.

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:16:31 2 Q. 10 feet?

10:16:32 3 A. Yes.

10:16:32 4 Q. When you said he fired one round, was that
10:16:35 5 buckshot?

10:16:36 6 A. Yes, it was.

10:16:36 7 Q. Okay. You testified earlier that you're
10:16:39 8 trained in firearms?

10:16:40 9 A. Yes.

10:16:40 10 Q. Okay. And you're trained also in
10:16:43 11 ammunition?

10:16:43 12 A. Yes.

10:16:43 13 Q. Okay. Is there a reason why Deputy
10:16:47 14 Carroll was utilizing buckshot that evening?

10:16:50 15 A. Buckshot versus slugs?

10:16:52 16 Q. Yes.

10:16:53 17 A. Okay. The two types of ammunition we
10:16:55 18 generally carry would be slugs and buckshot. The
10:16:57 19 reason we don't carry slugs is primarily the -- what
10:17:01 20 it can carry through. Again, if we shoot something
10:17:04 21 into the floor, through a wall, the slug will continue
10:17:08 22 to carry and we don't want that round to carry through
10:17:12 23 walls striking things that we don't know that it's
10:17:12 24 going to strike.

10:17:13 25 So the primary reason for firing buckshot

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:17:15 2 is for the safety purposes.

10:17:16 3 Q. Before you did this -- before you breached
10:17:20 4 the doorway and before you entered the premises
10:17:23 5 pursuant to a properly executed search warrant, is it
10:17:26 6 fair to say that you did some sort of planning?

10:17:28 7 A. Yes.

10:17:29 8 Q. Okay. And part of the planning would
10:17:32 9 involve choosing what form of ammunition to load the
10:17:36 10 gun with, correct?

10:17:36 11 A. Correct.

10:17:37 12 Q. Okay. And as part of that planning, is it
10:17:40 13 fair to say -- and only answer if you know. Is it
10:17:44 14 fair to say that there was a deliberate choice to
10:17:46 15 choose buckshot over lead slugs?

10:17:49 16 A. Yes. Any search warrant that we ever do
10:17:50 17 is -- I don't even want to say it's a discussion.
10:17:52 18 It's just known that we always carry buckshot.

10:17:55 19 Q. Okay. And is one of the considerations
10:17:56 20 for choosing buckshot the fact that there might be
10:17:59 21 animals present?

10:18:00 22 A. Sure.

10:18:01 23 Q. Okay. And the reasoning behind that,
10:18:05 24 would that be because if you shoot the dog or if you
10:18:07 25 shoot an animal, the chances of that bullet going

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JOSEPH HOPPER - CX BY MS. AGOLA

through a doorway or a wall is diminished?

A. Right. It's primarily for safety purposes, yes.

Q. Okay. And when you say that Officer Carroll shot one round, do you mean by that one bullet?

A. One round fired -- he fired one.

Q. One time, okay.

A. Yes.

Q. Do you know where that struck the animal?

A. I believe it struck the animal -- the front part. I believe the head of the animal.

Q. Do you know what part of the head?

A. I can't say I know it was the head, so I can't say exactly what part of the head.

Q. To the best of your recollection, did the dog drop where he was?

A. Yes.

Q. Okay. Did he drop to the side?

A. Yes.

Q. Did he drop to the left side?

A. I believe the dog was lying -- it was lying on its left side, yes.

Q. Do you know when he was lying -- the dog

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:19:13 2 was lying on his left side, whether his head was
10:19:15 3 pointed towards the kitchen?

10:19:17 4 A. I can't say that for sure. I can't say.

10:19:27 5 Q. But it was your earlier testimony -- and
10:19:29 6 correct me if I'm wrong -- that when you entered the
10:19:32 7 premises, that he was charging at you; correct?

10:19:32 8 A. Yes.

10:19:35 9 Q. And he was about 10 feet away?

10:19:37 10 A. Approximately, yes.

10:19:37 11 Q. All right. And was he heading directly
10:19:42 12 towards Officer Carroll -- or Deputy Carroll -- strike
10:19:42 13 that.

10:19:45 14 Was he heading directly towards Deputy
10:19:48 15 Carroll?

10:19:48 16 A. Yes.

10:19:48 17 Q. All right. Prior to -- as part of your
10:19:55 18 planning, did you have any reason to know that there
10:19:57 19 was going to be a dog there?

10:19:58 20 A. Specifically, no. We always plan for the
10:20:02 21 possibility.

10:20:02 22 (The following exhibit was marked at a previous
10:20:03 23 deposition: Number 1.)

10:20:03 24 Q. I'm going to show you what has been
10:20:05 25 previously marked as Plaintiff's Exhibit 1.

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:20:14 2 Officer, I'm going to put this before you.
10:20:17 3 If you would just take a moment to review it and then
10:20:19 4 if you would identify it for the record.

10:20:22 5 A. Okay.

10:20:37 6 Q. What is that document?

10:20:38 7 A. This is a field information interview
10:20:42 8 form.

10:20:42 9 Q. How is that implemented?

10:20:45 10 A. It's basically implemented by officers on
10:20:49 11 the street that develop information.

10:20:53 12 Q. Before you go into a location pursuant to
10:20:55 13 a warrant, you might build this information so that
10:20:58 14 you know what you're entering into?

10:21:00 15 A. Yes.

10:21:00 16 Q. Is it fair to say that -- and take a
10:21:03 17 moment to review it if you need to. But is it fair to
10:21:05 18 say that the document before you, that's Plaintiff's
10:21:07 19 Exhibit No. 1, identifies that there is a dog on the
10:21:10 20 premises?

10:21:10 21 A. Yes. It says that there is a dog that
10:21:13 22 hangs out in the garage/backyard area.

10:21:16 23 Q. Is it your testimony here today that you
10:21:18 24 never saw that document before you went in?

10:21:19 25 A. I don't recall seeing the document. It's

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10:21:21 2 not that I haven't seen it. I don't recall seeing it.
10:21:24 3 Deputy Carroll may have seen it.

10:21:25 4 Q. Would it -- if Deputy Carroll had seen
10:21:29 5 that document, would that be one of the reasons why he
10:21:33 6 might have loaded his gun with buckshot that day?

10:21:35 7 A. No. On every search warrant, we always
10:21:38 8 carry a shotgun and it's always loaded with buckshot.

10:21:40 9 Q. You always carry a gun. Do you know whose
10:21:43 10 gun that was that day?

10:21:44 11 A. Who owned the gun?

10:21:45 12 Q. Uh-huh.

10:21:45 13 A. Most guns are owned by either the County
10:21:50 14 of Monroe or the City of Rochester. We take them out
10:21:53 15 of a gun locker before we go. That's where they're
10:21:56 16 stored.

10:21:56 17 Q. Okay. So you don't have any personal
10:21:58 18 knowledge today as to whether --

10:21:59 19 A. That particular gun, no.

10:22:00 20 Q. That particular gun. But it is fair to
10:22:02 21 say that there was a meeting of the minds as to the
10:22:06 22 fact of who is going to go first, correct?

10:22:08 23 A. Yes.

10:22:08 24 Q. What the gun was going to be loaded with,
10:22:12 25 correct?

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:22:12 2 A. Yes.

10:22:12 3 Q. Based upon your recognizance before you
10:22:17 4 entered the premises, correct?

10:22:17 5 A. Yes.

10:22:17 6 Q. And your testimony here today is that
10:22:19 7 although that document emanates from the Greece Police
10:22:22 8 Department, that you've never seen it before?

10:22:23 9 A. I'm not saying I haven't seen it. I don't
10:22:26 10 recall seeing it.

10:22:26 11 Q. Okay.

10:22:27 12 A. Generally whoever is planning the search
10:22:28 13 warrant would gather this information and would put it
10:22:31 14 into the planning.

10:22:32 15 Q. And as the second person in, is it less
10:22:38 16 important for you to know whether there's an animal on
10:22:40 17 the premises because you weren't the lead man in?

10:22:43 18 A. No.

10:22:43 19 Q. Okay. So your testimony is that you
10:22:46 20 simply did not know whether there was an animal there?

10:22:49 21 A. My testimony is that there could or could
10:22:57 22 have not been a dog, that we always plan that there
10:22:59 23 could or could not be animals. We always plan for
10:23:01 24 that.

10:23:01 25 Q. And you are not an employee of the County

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1 JOSEPH HOPPER - CX BY MS. AGOLA

10:23:04 2 of Monroe?

10:23:05 3 A. Correct.

10:23:05 4 Q. And you have different policies than the
10:23:09 5 County of Monroe as a Greece police officer, correct?

10:23:12 6 A. Correct.

10:23:13 7 Q. Okay. So you're not governed by any of
10:23:16 8 the policies that might be promulgated by the County,
10:23:20 9 correct?

10:23:20 10 A. Correct.

10:23:20 11 Q. And you stated earlier that you saw a
10:23:25 12 female in the hallway that you identified as Sherry
10:23:27 13 Carroll; correct?

10:23:28 14 A. Yes.

10:23:28 15 Q. And that Deputy Carroll did affirmatively
10:23:31 16 state to her, "Get your dog," or --

10:23:33 17 A. "Get the dog, get the dog." You know,
10:23:35 18 just shouting commands. "Get the dog, get the dog."

10:23:39 19 Q. And the dog was 10 feet away from Deputy
10:23:43 20 Carroll before he shot?

10:23:43 21 A. Approximately, yes.

10:23:43 22 Q. Okay.

10:23:46 23 A. I didn't measure it. I'm saying
10:23:48 24 approximately.

10:23:49 25 MS. AGOLA: Okay. Thank you.

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JOSEPH HOPPER - RDX BY MR. FULLER

RE-DIRECT EXAMINATION BY MR. FULLER:

Q. Okay. Do you know approximately how far the dog was from Deputy Carroll when the dog went down?

A. I believe in the -- almost the same area. I don't think it traveled much further after the shot was fired.

Q. Okay. This is from your recollection and your vantage point?

A. Yes.

Q. Now, did you plan the search warrant?

A. I did not.

Q. Do you know who did?

A. I believe it was Deputy Carroll.

Q. Could it have been somebody from Brighton?

A. It could have been Officer DeSain.

Q. You don't recall?

A. I don't recall who was the planning officer, no.

Q. Does GRANET have its own policies?

A. Yes.

Q. Okay. And before -- or actually while you were in GRANET, did you receive training concerning GRANET?

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1 JOSEPH HOPPER - RDX BY MR. FULLER

0:24:45 2 A. Yes.

10:24:45 3 Q. Do you recall what that was?

10:24:45 4 A. Prior to any member of our department
10:24:52 5 going to GRANET, we receive -- we go to a high risk
10:24:56 6 warrant school.

10:24:57 7 Q. Okay.

10:24:57 8 A. Which is a 40-hour course that
10:25:00 9 specifically deals with executing high risk type
10:25:04 10 warrants.

10:25:04 11 Q. And do you know some of the agencies
10:25:07 12 involved in GRANET?

10:25:08 13 A. The Greece Police Department, the Monroe
10:25:12 14 County Sheriff's Office, Brighton Police, Irondequoit
10:25:16 15 Police, the Rochester Police Department. We also have
10:25:20 16 members from -- some federal agents that are part of
10:25:24 17 the unit.

10:25:27 18 Q. Okay. To your knowledge, does Greece have
10:25:32 19 different policies from the other agencies?

10:25:34 20 A. On minor things. I think generally our
10:25:39 21 policies pretty much overlap each other.

10:25:42 22 Q. Okay. With all these agencies, do you
10:25:46 23 follow GRANET policies?

10:25:48 24 A. For executing a search warrant, we follow,
10:25:52 25 yes, the GRANET policy. Everything is done a certain

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JOSEPH HOPPER - RDX BY MR. FULLER

way.

When incidents outside of GRANET happen or after the search warrant is executed, then we fall back. If an incident involves a certain officer from that department, then the policies of that department take over.

MR. FULLER: Okay. No further questions.

MS. AGOLA. That's it. Thank you, sir.

VIDEOGRAPHER: The time is 10:25. This deposition is now complete.

(TIME: 10:25 a.m.)

* * *

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WESTERN DISTRICT OF NEW YORK

**SHERRY CARROLL, Individually and as
Natural Parent and Legal Guardian on
Behalf of DAVID CARROLL ,**

Plaintiff,

v.

COUNTY OF MONROE, et al.,

Defendants.

**DEFENDANTS' REPLY
DECLARATION IN
RESPONSE TO PLAINTIFF'S
POST TRIAL APPEAL
MOTION**

Case No.: 07 CV 6123 CJS(P)

**Pursuant to 28 U.S.C. §1746, Paul D. Fuller, Esq., declares as
follows:**

1. I am a Deputy County Attorney and attorney for Defendants County of Monroe and Deputy James Carroll.
2. This declaration and the Defendants' memorandum of law submitted herewith are submitted in opposition to Plaintiff's post-trial motions under Fed. R. Civ. P. 50 and 59.
3. For the reasons set forth in Defendants' Memorandum of Law and Carroll Trial Testimony Transcript (provided by Plaintiff as Exhibits A and F) the Plaintiff's motion should be denied in its entirety.

4. The Jury's verdict was based on the credible evidence presented at trial. No reasonable juror would have been compelled to accept the view of the Plaintiff.

5. The Court must view the evidence in light most favorable to the Defendants, the non-moving party in this case, and also must draw all reasonable inferences in favor of the Defendants (**Defendants' Memorandum of Law of Point I**).

6. The Jury reached a just and proper result by their verdict in favor of the Defendants. There was no "clear error" "manifest injustice" or "seriously erroneous result" and the verdict was not a "miscarriage of justice". (**Defendants' Memorandum of Law of Point II**).

7. The action of Deputy Carroll in shooting the vicious dog Damien during the execution of a no-knock search warrant was reasonable, and did not constitute an unlawful seizure under the Fourth Amendment (**Defendants' Memorandum of Law of Point III**).

CONCLUSION

For the reasons set forth above and as more fully discussed in the Defendants' memorandum of law filed herewith, the Plaintiff's motion should be denied in its entirety.

WHEREFORE, Defendants, County of Monroe and Deputy James Carroll, respectfully pray for an order of this Court as follows:

- A. An order dismissing Plaintiff's motion under Federal Rules of Civil Procedure 50; and
- B. An order dismissing Plaintiff's motion under Federal Rules of Civil Procedure 59; and
- C. An order pursuant to 42 U.S.C. §1988 awarding the Defendants' attorney's fees; and
- D. Such other and further relief as to this Court may seem just and proper.

Executed on August 24, 2011

**DAVID VAN VARICK, ESQ.
MONROE COUNTY ATTORNEY**

*Attorney for defendants
County of Monroe and Deputy James Carroll*

/s/ Paul D. Fuller

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WESTERN DISTRICT OF NEW YORK

**SHERRY CARROLL, Individually and as
Natural Parent and Legal Guardian on
Behalf of DAVID CARROLL ,
Plaintiff,**

v.

**COUNTY OF MONROE, et al.,
Defendants.**

MEMORANDUM OF LAW

Case No.: 07 CV 6123 CJS(P)

**Defendants' Memorandum of Law in Opposition
To Plaintiff's Motion Set aside the verdict and for
a new trial pursuant to Fed. R. Civ. Pro. 50 and 59.**

POINT I

THE JURY'S VERDICT WAS BASED ON THE CREDIBLE EVIDENCE

A *Rule 50(b)* motion “is limited to those grounds that were specifically raised in the prior [Rule 50(a) motion].” *Tolbert v. Queens College*, 242 F.3d 58, 70 (2d Cir.2001). Pursuant to this specificity requirement, the Rule 50(a) motion “must at least identify the specific element that the defendant contends is insufficiently supported.” *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir.1998). The purpose of the specificity requirement is “so that the responding party may seek to correct any overlooked deficiencies in the proof.” *Id.* (quoting Fed.R.Civ.P. 50 Advisory Committee Note (1991)). “Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion.” FED. R. CIV. P. 50 advisory committee's 2006 note. *AIG Global Secs. Lending Corp. v. Banc of Am. Secs., LLC*, 386 Fed. Appx. 5, 6 (2d Cir.2010) (“[A motion to enter a judgment as a matter of law] may be renewed after an unfavorable verdict, but limited only to the grounds specifically raised in the prior motion for judgment as a matter of law; new grounds may not be added post-trial.”).

A Rule 50(b) motion should be granted only when there is “such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture,” or where there is “such an overwhelming amount of evidence” in favor of the moving party that fair minded jurors could not reasonably arrive at a verdict against the movant; *Gronowski v. Spencer*, 424 F.3d 285, 292 (2d Cir.2006), *Ware v. ABB Air Preheater, Inc.*, 91-CV-37S, 1995 WL 574464 (W.D.N.Y. Sept. 28, 1995) *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992)), *Luciano v. Olsten Corp.*, 110 F.3d 210,(2d Cir.1997).

In deciding such a motion, “the Court may not weigh the evidence or assess the credibility of witnesses. Rather, the Court must view the evidence in the light most favorable to the non-moving party.” *Banff Ltd. v. Express, Inc.*, 93 Civ. 2514, 1996 WL 2003 (S.D.N.Y. Dec. 29, 1995) (citing *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14-16 (2d Cir. 1993); *Alpex Computer Corp. v. Nintendo Co.*, 86 Civ. 1749, 1994 WL 681752 (S.D.N.Y. Dec. 5, 1994)). The Court must also draw all reasonable inferences in favor of the nonmoving party. *Konik v. Champlain Valley Physicians Hosp. Medical Center*, 733 F.2d 1007, 1013 (2d Cir.1984).

The motion should be granted “only if [the court] can conclude that, with credibility assessments made against the moving party, a reasonable juror would have been compelled to accept the view of the moving party.” *Piesco v. Koch*, 12 F.3d 332, 343 (2d Cir.1993). The court cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury.” *Tolbert v. Queens College*, 242 F.3d 58, 70 (2d Cir.2001) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 367 (2d Cir.1988)), *Fabri v. United Technologies International Inc.*, 387 F.3d 109, 119 (2d Cir.2004), *Sanders v. New York City Human Resources Administration*, 361 F.3d 749, 755 (2d Cir.2004).

The “court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weight the evidence ‘Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.’ ” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 9 L.Ed.2d 202 (1986)).

A judgment as a matter of law is thus “proper only if ‘the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that

reasonable men could have reached.’ ” *Fiacco v. City of Rensselaer*, 783 F.2d 319, 329 (2d Cir.1986) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir.1970)). Also, in making this determination, the court “must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Reeves v. Sanderson*, 530 U.S. 133, at 151 120 S.Ct. 2017; *Meloff v. New York Life Insurance Company*, 240 F.3d 138, 145 (2d Cir.2001).

Such motions “should be granted cautiously and sparingly.” 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524, at 252 (1995); *Japan Airlines Company Ltd. v. Port Authority of New York & New Jersey*, 178 F.3d 103, 112 (2d Cir.1999). In ruling on a motion for judgment as a matter of law, the court may not itself weigh credibility or otherwise consider the weight of evidence; rather, it must defer to the credibility assessments that may have been made by the jury and the reasonable factual inferences that may have been drawn by the jury. *Williams v. County of Westchester*, 171 F.3d 98, 101 (2d Cir.1999).

The Jury in the instant case was presented with credible evidence in the form of Defense testimony and exhibits, and the Plaintiff failed to prove her case.

POINT II

THE JURY'S VERDICT WAS JUST AND PROPER

The plaintiff moves for judgment as a matter of law, pursuant to Rule 50(b), “or in the alternative for a new trial, pursuant to Fed.R.Civ.P. 59.” In the plaintiff’s motion papers little is said about Rule 59. In fact, a review of the Rule itself reveals little explanation with regard to the legal basis for the Rule, which reads in relevant part: “[A]bsent a showing of clear error or manifest injustice, it will generally be appropriate to deny relief pursuant to Rule 59 since litigants should neither be required nor without good cause permitted to relitigate already-decided matters.” *Int’l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1287 (2d Cir. 1994).

In evaluating a Rule 59 motion, the trial judge's duty is essentially to see that there is no miscarriage of justice. *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir.1978). A motion for a new trial should not be granted unless the Court is “convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.” *Sorluccho*, 971 F.2d at 864 (1992); *Nimely v. City of New York*, 414 F.3d 381, 390 (2d Cir.2005); *Smith v. Nurse Carpenter*, 316 F.3d 178 (2d Cir.2003); *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 623 (2d Cir.2001).

In applying this standard,

[t]he trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is [the judge's] duty to set the verdict aside; otherwise not.

Bevevino v. M.S. Saydjari, 574 F.2d 676, 684 (2d Cir.1978) .

A court “has significant discretion in deciding whether to grant a Rule 59 motion for a new trial.” *Manganiello v. Agostini*, 2008 WL 5159776, at *8 (S.D.N.Y. Dec.9, 2008) (citing *Amato v. City of Saratoga Springs*, 170 F.3d 311, 314 (2d Cir.1999)). Unlike a Rule 50 motion, which calls upon a court to view the evidence in the light most favorable to the verdict winner, a court considering a Rule 59 motion “may independently weigh the evidence.” *Id.* Nonetheless, a court should not grant a new trial unless the “court determines that, in its independent judgment, the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice.” *Nimely v. City of New York*, 414 F.3d 381, 392 (2d Cir.2005).

In the case at bar, the Jury reached the proper and just verdict based on the credible evidence at trial.

POINT III

THE ACTION OF DEPUTY CARROLL IN SHOOTING THE VICIOUS DOG WAS REASONABLE AND DID NOT CONSTITUTE AN UNLAWFUL SEIZURE

To succeed on a Fourth Amendment claim for unlawful seizure, a plaintiff must not only show that a seizure occurred, but also that the seizure was unreasonable, *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). A court must consider the totality of the circumstances and balance “the nature of the quality and quantity of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake to determine whether the force used to effect a particular seizure was reasonably necessary, *Graham v. Connor*, 490 U.S. 386, 396 (1989). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396.

The primary governmental interest to be considered in a Fourth Amendment claim based on the shooting of a dog is the safety of the officer. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F. 3d 962, 977 (9th Cir. 2005) (governmental interest of safety may provide “sound justification” for officer's conduct in shooting dog). Where danger is unexpected

and imminent, or dogs are allowed to run free, unleashed, uncontrolled, and unsupervised, the balance tips in favor of the governmental interest. *Id.* (had officers been surprised by presence of dogs, safety may justify shooting); *Hatch v. Grosinger*, No. Civ.01–1906(RHK/AJB), 2003 WL 1610778, at *5 (D.Minn. March 3, 2003) (“The balance of these interests depend on whether an objectively reasonable officer in the position of Deputy Grosinger could conclude that the Hatches' dog posed an imminent threat.”); *Altman v. City of High Point*, 330 F.3d 194, 205 (4th Cir.2003).

In *Warboys v. Proulx*, 303 F.Supp.2d 111 (D.Conn.2004), the court found the killing of the dog to be reasonable. In the Warboys case, three officers and a trained police canine were in a parking lot allowing the police canine to identify a scent that might have been that of the fleeing car theft suspect they were tracking. *Id.* at 113. The officers saw a young male leaving an adjacent residence and advised him to return to the residence for safety reasons. *Id.* at 114. Blitz, the family pit bull who weighed about ninety-five pounds, escaped through the open door and moved toward one officer and the police canine. The young male attempt to grab Blitz as he went by but missed and then yelled to the officers that Blitz wouldn't hurt them. As Blitz approached the officer, the officer unholstered his gun and shot and killed the dog. Blitz was five to ten feet from the

officer at the time he was shot. The whole event occurred in about five seconds *Id.* The Warboys Court held that the law simply does not require a reasonable officer in Proulx's circumstances to have used less force to protect himself, his police dog, and the officers standing nearby. *Id.* at 117–19. The court relied, at least in part, on the fact that Blitz was a pit bull, that pit bulls are a dangerous breed, and that their aggressiveness may be undetectable. *Id.* at 118 n.13.

The same court found an officer acted reasonably in shooting a sixty-pound dog who, while running in circles, was advancing toward the officer at a rate of three feet per second over a five second period, when the dog was fifteen feet away from the officer. *Dziekan v. Gaynor*, 376 F.Supp.2d 267, 271–272 (D.Conn.2005). The court concluded that “[i]n light of the important interest in the defendant's self-protection, and the split-second decision-making required, the seizure was not an unreasonable intrusion on plaintiff's Fourth Amendment rights.” *Id.* at 272.

Based on the credible evidence of the instant case, Defendant Deputy James Carroll acted reasonably in shooting the dog Damian. An officer who encounters a large aggressive growling and barking dog that approaches the officer at a steady rate and reaches a distance of no more than one foot—does not act unreasonably in shooting the dog in order to protect himself and his fellow officers. The credible evidence has shown that Damian was intermittently barking, growling, and showing his teeth upon his steady and aggressive approach.

Brighton Police Sargent DeSain testified on direct examination (Transcript p. 31 Lines 17-25):

Q. Do you know approximately how far the dog was from Deputy Carroll when he shot it?

A. About one foot.

Q. And can you tell the jury how the dog was acting when you observed it?

A. It was vicious. It was not a friendly dog.

Q. In your opinion, and based on your observations, was the dog aggressive?

A. Yes.

Deputy Carroll Testified as to his observations of the dog Damian (Transcript p.53 Lines 19-23:

Q. Can you describe the way the dog was coming toward you?

A. He was coming in -- not a run, but a fast pace, direct movement towards me. He wasn't hesitating. He was showing me his front teeth, and growling, and barking at the same time.

Greece Police Officer Joseph Hopper Testified as to his observations of the dog Damian (Plaintiff's Exhibit F Transcript p.10 Lines 20-23):

Q. Can you describe the dog, to the best of your memory?

A. It was a very large dark-colored dog.

Q. Okay. And how was the dog acting?

A. Aggressive. Barking, showing its teeth just in an aggressive manner.

The Plaintiff relies on language from The *Hells Angels* Case (*San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, (9th Cir. 2005)) and the *Fuller* case (*Fuller v. Vines*, 36 F.3d 65 at 66 (9th Cir. 1994)), both opinions from the Ninth Circuit, in which the court held the officer's actions were not reasonable under the circumstances. The Ninth Circuit cases are easily distinguishable from the case at bar.

In the *Hells Angels* Case, the dogs were killed during the execution of search warrants that had been issued at least a week prior to the operation. The search warrants were **not** no-knock warrants and the occupants were not at home at the time of the execution of the warrant in one of the homes, nor were the occupants of the homes charged with or suspected of any crimes.

The warrants in the *Hells Angels* case were served to obtain evidence for a sentencing to show that the person to be sentenced was a member of a gang. The evidence was not of the type that could be destroyed upon short notice, such as flushing it down the toilet. The evidence that was collected included two motorcycles, a refrigerator door, a mailbox, a portion of the front sidewalk that had to be removed with a jackhammer and literally truckloads of evidence resulting in the rental of a special storage facility to accommodate all of the Hell's Angels indicia that was collected and loaded on the trucks. In the Souza residence, the dogs were not in the house, but located in the back yard. This was also the second search warrant served on this house and a sign indicated there were dogs on the premise. The second residence searched in the *Hells Angels* case was the Viera residence. The dogs at this residence were also located outside when the police arrived and this second search was also one week in the making. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, (9th Cir. 2005).

The Ninth Circuit held that because the officer knew of the dogs and had an opportunity to devise a plan to immobilize the dogs, the killing of the dogs was unreasonable. *Id.* at 977. Again, the *Hell's Angels* case was not a situation where a no-knock warrant was the subject of service, nor was there a danger of the

destruction of evidence. The officers in the case at bar did not have weeks to plan the no-knock search of the Carroll house; they acted on the no-knock warrant the same day they received it.

The evidence presented by the plaintiffs in the *Fuller* case established that at the time of the shooting, the plaintiffs were in their front yard with their dog and that the dog merely stood stationary as officers approached. Police officers were investigating another matter when they passed by the Fullers' front yard. The

Fullers were in the yard, along with their pet dog, "Champ", and allege that as the officers approached Champ merely stood up from where he had been lying. The officers, on the other hand, contended that Champ charged them, barking and growling. James Fuller, Sr. contended that he pleaded with the officers not to shoot his dog and told them that he could control him. Nonetheless, the officers shot Champ twice, and Champ died shortly thereafter. *Fuller v. Vines*, 36 F.3d 65 at 66 (9th Cir. 1994). The *Fuller* case did not involve a no-knock warrant, nor were the Fullers suspected of any crime. The Fullers were merely in their front yard with their dog as police officers passed by on their way to an alleged car-stripping crime elsewhere in the neighborhood.

The dog at issue in the instant case was inside a house subject to a court-ordered no-knock search warrant and after entry by the warrant team aggressively approached Deputy Carroll at a steady pace while barking, growling

and showing its teeth. In the *Fuller* case, the dog was in its own yard with its owners close enough to the dog to control it before an attack.

Brighton Police Sargent Michael DeSain explained in his trial testimony why non-lethal means to contain a vicious dog attacking an officer is not a consideration for a no-knock search warrant (Transcript page 17 & 18, lines 23-25 & 1-14):

A. There is no training that would state when to use lethal force against a dog. There is no specific training to address that. If an officer is on a routine alarm at a home and a dog runs out and attempts to attack him, there's nothing in the book that says you will do A, B, C and D, prior to destroying that dog.

Each officer who encounters a situation like this uses his abilities as best as he can to try to handle that threat of a dog. If it's running on top of a car to get away from the dog, we would do that. You know, the last thing we want to do is destroy an animal, but when I'm given the job to execute a search warrant that is a no-knock warrant, we don't have that ability.

We don't have that ability to use Animal Control, to use a less than lethal type of weapon. If I had that

ability, we would have chose to do that. We don't have the time to do that, because our lives are at risk entering that door.

If I were able to give a warning to the resident, which would essentially be a knock warrant, then we would use an alternative means. We would have Animal Control by our side with a noose in order to, you know, obtain that dog to prevent it from attacking us. But in this particular case we don't have that option.

Brighton Police Sargent Michael DeSain explained in his trial testimony why a vicious dog would have to be shot during a no-knock search warrant (Transcript page 19 & 20, lines 21-25 & 1-20):

A. There are no other means to handle a vicious dog attacking you on a no-knock search warrant. When you enter a house and a dog takes off after you and is about ready to bite you and slow down the flow of the entry team into the fatal funnel of this home, there is no other means presented, other than to dispatch the dog that's vicious.

There are multiple occasions I've been on search warrants with animals where the dog was not dispatched, and that is the ideal way to handle it. However, if the dog decides to attack an officer upon entry, what that

does, essentially, it slows down that officer getting through what we in police worked are trained as the fatal funnel. If you stop in that fatal funnel, other officers lives are at risk by the bad guy or the bad person inside the home. They have means to weapons.

They don't know we're there. We don't knock and say, hey, you know, GRANET outside, let us in. We breach the door by a court authorized search warrant without them knowing. So, they could be in bed, they could be washing the dishes, there's a ton of things that they could be doing. What happens as a result of that, a vicious dog comes forward and attacks one of our officers, and there's five guys behind him that want to get through that door, and they can't get through it because that officer is dealing with a threat; that threat being a vicious dog.

During Trial, Brighton Police Sargent DeSain described what a "fatal funnel" was (Transcript page 26 lines 19-25 page 27 lines 1-5):

A. In these schools that I previously mentioned, we are instructed to remove yourself from the fatal funnel. So, the fatal funnel could be a doorway to a bedroom, a doorway to a home. And the reason for that is, statistically, if

officers are killed upon entry or shot, they're shot at the doorway. Because if you're a bad guy inside of a home, and you have access to weapons, you would grab that weapon and immediately shoot toward a door; whether you were shooting towards a person or not, it wouldn't matter. But if you shot toward a door, your chances of hitting somebody on entry would be pretty high. So, our job is to get out of that fatal funnel, and we do so expeditiously and in a certain way every time.

Before a seizure arises to a constitutional violation, the Court must determine whether the interference was unreasonable. "The Fourth Amendment is not, of course, a guarantee against all searches and seizures, but only against unreasonable searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985). The state has an interest in restraining animals to protect the life or property of others. *Brown v. Muhlenberg Twp.*, 269 F.3d 205 at 210 (3rd Cir 2001). The amount of force utilized to restrain an animal waxes and wanes with the danger it possesses. See *Id.* at 210–211. The destruction of an animal that poses little or no danger to the life or property of others would constitute an unreasonable seizure. See *Id.* at 211 (holding that an officer's destruction of a dog that presented little or no danger to his life was an unreasonable seizure).

The state's interest, however, may justify the "extreme intrusion occasioned" by an animal's destruction if that animal poses an "imminent danger" to the life or

property of others. *Id.* at 210–11; see *Altman v. City of High Point, North Carolina*, 330 F.3d 194, 206 (4th Cir.2003) (concluding that an officer's destruction of a fleeing dog was reasonable because he could not safely capture the reportedly aggressive animal). This decision regarding the quantity of danger to life or property an animal possesses is not determined by the subjective intent of the officer. Rather, the officer's actions are viewed from an objective prospective. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[T]he question is whether the officers' actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation”). The Court has specifically admonished that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396–97. In other words, a court must substitute itself for the officer at the time the actions occurred and determine whether the officer's actions were objectively unreasonable. *Altman v. City of High Point, North Carolina*, 330 F.3d 194, 205 (4th Cir.2003).

The reasonableness of Defendant Deputy Carroll’s actions is especially illustrated by the timing of his decision to shoot Damian. Defendant Deputy Carroll’s decision to discharge his firearm and utilize deadly force only occurred at the last possible moment, as the dog was about one foot from him. Based

upon the totality of Damian's actions, this decision to shoot a dog about to attack Deputy Carroll was objectively reasonable. Defendant Deputy Carroll, out of fear for his personal safety, discharged his firearm because he believed he was in imminent danger of being attacked or bitten by Damian. Plaintiff additionally contends Defendant Deputy Carroll's actions were unreasonable because he could have chosen another response rather than shooting Damian, such as calling Plaintiff in advance of his arrival or firing a warning shot. This argument, however, misconstrues the Supreme Court's interpretation of reasonableness.

Reasonableness is not a rigid standard that requires an officer to choose the single best possible response. It's more variable. The objective reasonableness standard permits an officer to select his reaction from a smorgasbord of alternative choices, with the single requirement that his action be justified by the circumstances. See *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (“[t]he fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, by itself, render the search unreasonable”)); see also *Hatch v. Grosinger*, No. 01–1906, 2003 WL 1610778, at * 5 (D.Minn. March 3, 2003) (quoting *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir.1995) (addressing plaintiff's argument that defendants could have responded in a different manner, the court opined that “the Fourth Amendment does not allow this type of Monday morning quarterback approach because it only requires that the seizure fall within a range of objective reasonableness”)).

Defendant Deputy Carroll's decision to discharge his firearm was one of the many split second judgments law enforcement officers must make. The facts clearly indicate the circumstances were uncertain and rapidly evolving. Defendant Deputy Carroll's decision on whether and what type of force to use was well within the realm of reasonableness. When confronted with an aggressive dog that made him fearful for his safety, Deputy Carroll chose to shoot Damian. This choice, whether right or wrong, is not for the Court to second guess because it was an objectively reasonable response to the circumstances Defendant Deputy Carroll confronted. In light of Defendant Deputy Carroll's objectively reasonable conduct, the Court should conclude that the seizure was reasonable.

If Deputy Carroll refrained from shooting Damian and the dog acted out his hostile demeanor as he appeared ready to do, the time would have already expired for Deputy Carroll to safely discharge his firearm in self-defense. *Warboys v. Proulx*, 303 F.Supp.2d 111, 118 (D.Conn.2004). Defendant Deputy Carroll would be forced to defend himself by some other means and, perhaps, risk serious injury or death. See *Id.* The reasonableness standard does not require this type of wait and see approach. Defendant Deputy Carroll need not wait until a threat is literally within inches of striking distance before utilizing deadly force. Although, in fact, Damian was within one foot from attacking Deputy Carroll at the time he was forced to shoot the Pit Bull Mastiff.

Under the facts of this case, the actions of Defendant Deputy James Carroll were reasonable under the circumstances. The Deputy indicated that he felt threatened by the attacking dog. Plaintiff has provided no evidence that the dog was not attacking the Deputy since the Plaintiff was not in the room at the time the gun shot was fired, and admittedly did not see the incident. An officer has a right to protect himself from harm and Deputy James Carroll believed he was in a dangerous situation to a perceived attack by a large aggressive dog that the Deputy reasonably believed to be an attack dog. See *United States v. Harrington*, 923 F.2d 1371, 1373 (9th Cir.1991) (use of force does not render an action unconstitutional where the force was “justified by concern for the safety of the officers or others”); *Pfiel v. Rogers*, 757 F.2d 850, 866 (7th Cir.1985) (officer's shooting of dogs did not violate Fourth Amendment, although alternatives were available to the officer).

Plaintiff maintains the shooting of the dog was not reasonable. However, the Plaintiff did not observe the dog aggressively approaching the Deputy. Moreover, an officer need not use the least harmful alternative in dealing with a dangerous situation in which officer safety is an issue. Requiring the least intrusive alternative is not a realistic approach where law enforcement officers have to make split second decisions regarding their safety. “The calculus of reasonableness must embody allowance for the fact that police officers are often

forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

The governmental interest of officer safety outweighs the Plaintiff’s possessory interest in their dog. The damage to the dog was not “unnecessary” when the totality of the circumstances is considered. Plaintiff does not submit any evidence to dispute these facts. Plaintiff did not witness the incident, nor do they provide any testimony of the officers or others, including neighbors, which puts in dispute the facts as reported by the officers involved. Even construing the inferences of fact most favorably to the Plaintiff, the facts of the instant case are most closely aligned with the decisions holding that seizure was reasonable in light of the imminent danger posed by Damian. Based on these circumstances, Defendant Deputy James Carroll reasonably believed that the dog Damian posed an imminent threat to his safety and the safety of the other officers and, therefore, his conduct did not constitute an unreasonable seizure.

CONCLUSION

The Jury verdict was just and proper and based upon the credible evidence submitted at trial, and therefore should not be disturbed.

Respectfully submitted,

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MONROE COUNTY ATTORNEY

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Dated: August 25, 2011

WESTERN DISTRICT OF NEW YORK

**SHERRY CARROLL, Individually and as
Natural Parent and Legal Guardian on Behalf
of DAVID CARROLL ,**

Plaintiff,

v.

COUNTY OF MONROE, et al.,

Defendants.

CERTIFICATE OF SERVICE

Case No.: 07 CV 6123 CJS(P)

I hereby certify that on **August 25, 2011**, I electronically filed the foregoing documents:

1. Defendant's Reply Declaration in Response to Plaintiff's Post Trial Appeal Motion;
2. Memorandum of Law;
3. Certificate of Service.

with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant on this case:

CHRISTINA A. AGOLA, PLLC

Attorneys for plaintiff

1415 Monroe Avenue

Brighton, New York 14618

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I hereby certify that on, the following non-CM/ECF participant was served by mail with the foregoing:

None

s/Paul D. Fuller

PAUL D. FULLER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRY CARROLL, as Natural Parent &
Legal Guardian on behalf of David Carroll,

Plaintiff,

v.

COUNTY OF MONROE and
DEPUTY SHERIFF JAMES CARROLL,
in his Individual Capacity,

Defendants.

DECISION & ORDER

07-CV-6123P

PRELIMINARY STATEMENT

Currently pending before this Court is plaintiff's motion to set aside the verdict under Rule 50(b) of the Federal Rules of Civil Procedure or, in the alternative, for a new trial under Rule 59. (Docket # 79).

Plaintiff Sherry Carroll, on behalf of her son David Carroll ("David"), brought this case under 42 U.S.C. § 1983, alleging that the County of Monroe (the "County") and Deputy Sheriff James Carroll ("Carroll") violated David's constitutional rights by shooting and killing his dog during the execution of a search warrant at plaintiff's home. Following a two-day trial, the jury returned a verdict in favor of defendants. (Docket # 69).

In the pending motion, plaintiff argues that the verdict should be set aside, or a new trial granted, because the trial evidence established that the shooting was unreasonable within the meaning of the Fourth Amendment. Specifically, plaintiff contends that Carroll acted unreasonably in shooting the dog because Carroll knew before executing the warrant that a dog

was present at plaintiff's residence, but failed to formulate a plan to neutralize the dog using non-lethal means. Plaintiff emphasizes that the trial proof demonstrated that the County did not train its law enforcement officers in the use of non-lethal means to restrain animals present inside premises to be searched. For the reasons discussed below, plaintiff's motion is denied.

THE TRIAL

I. The Trial Testimony

On October 11, 2006, a warrant was issued authorizing the search of plaintiff's residence; the warrant permitted the officers to enter the residence without first knocking and announcing their presence (commonly referred to as a "no-knock warrant"). (Tr. 88). Officers from the Greater Rochester Area Narcotics Enforcement Team, including defendant Carroll and Brighton Police Department Sergeant Michael DeSain ("DeSain"), executed the warrant later that day. Before doing so, DeSain briefed the team about the plans to execute it. (Tr. 13). Carroll recalled that DeSain informed the team that a dog was present at the residence. (Tr. 38, 57). The team did not devise a plan for controlling the dog during the warrant's execution. (Tr. 15-16, 20, 38-39).

At the time of the search, the County had a written policy prohibiting the use of lethal force against an animal unless the animal posed a danger to officers or other persons. (Tr. 66). In addition, although the County trained its officers in the execution of search warrants, it did not train them specifically about how to handle dogs during warrant executions. (Tr. 17). Nor did it train them to identify the circumstances justifying the use of lethal force against a dog. (Tr. 17-19, 34).

DeSain and Carroll both testified that officers' options for dealing with animals present inside a residence to be searched were more limited when the warrant was a no-knock warrant than a knock-and-announce warrant. (Tr. 18, 34-35, 38-39). They testified that any delay in the execution of a no-knock warrant threatens to undermine the purpose of "no-knock" authorization, which is to ensure that evidence is not destroyed and to minimize threats to officers' safety. (Tr. 25, 32, 49). In the case of a knock-and-announce warrant, by contrast, officers are less concerned with delay and thus have more time to deal with a dog without resort to lethal means. (Tr. 34-35, 38-39).

As DeSain and Carroll further explained, when officers execute no-knock warrants, their actions are designed to move them out of the entry doorway – or the "fatal funnel," as the officers called it – as quickly as possible because doorways present easy targets for surprised or violent occupants. (Tr. 26-27, 38-39). According to DeSain, "statistically, if officers are killed upon entry or shot, they're shot at the doorway[;] . . . if you shot toward a door, your chances of hitting someone on entry would be pretty high." (Tr. 26-27). For that reason, DeSain explained officers must "get out of the fatal funnel [the doorway], and . . . do so expeditiously and in a certain way every time." (Tr. 27).

In this case, the officers approached plaintiff's residence surreptitiously and then lined up in a "stack" at the front door. (Tr. 28). Carroll was the first officer in the stack and carried a shotgun. (Tr. 31). Carroll was responsible for securing the entrance by "mak[ing] sure that nothing . . . surprise[d] [them] in the front" in order to "get everybody out of the fatal funnel as fast as possible." (Tr. 52-53).

After DeSain broke through the front door with a battering ram, Carroll was the first to enter. (Tr. 30). He immediately heard growling and barking and observed a dog quickly and aggressively approaching him from the hallway. (Tr. 40, 53). The dog “was showing his front teeth, and growling, and barking at the same time.” (Tr. 53). Carroll also saw the plaintiff in the hallway, but she was too far behind the dog to stop it. (Tr. 54). Carroll shouted to the plaintiff to get out of the hallway; by the time she did, the dog had advanced to within one foot of Carroll. (Tr. 54-55). At that point, he fired one shot at the dog’s head and killed it. (*Id.*).

Both DeSain and Carroll described several scenarios that they had encountered in executing other warrants that did not necessitate the use of lethal force – such as, where the owner had been able to restrain the dog, where the dog had run away, or where the dog had laid down. (Tr. 32-33, 57). According to DeSain, even if the team had formulated a plan to use non-lethal means against the dog,¹ the dog still would have been shot because its hostile behavior jeopardized the officers’ safety. (Tr. 19-20).

II. The Jury Instructions

In relevant part, the jury was instructed as follows:

The Fourth Amendment to the United States Constitution protects the right of persons to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. Plaintiff claims that his right to be free from unreasonable seizures was violated when his dog was shot during the execution of a search warrant for his home. The legality of the search warrant itself is not an issue in this case. What is at issue is the reasonableness of the shooting of the dog. I instruct you as a matter of law that an

¹ Plaintiff introduced no evidence – fact or expert – identifying any specific non-lethal alternatives that could have been employed to neutralize the dog under the circumstances presented in this case.

individual's interest in his dog falls within the Fourth Amendment's protection against unreasonable seizures.

In this case, the plaintiff claims that it was unreasonable for Deputy James Carroll to shoot the dog and that therefore, the shooting of the dog was an unreasonable seizure under the Fourth Amendment. The Fourth Amendment's reasonableness inquiry requires a balancing of the nature and quality of the intrusion on the plaintiff's Fourth Amendment right to be free from unreasonable seizures against the government's interest in protecting law enforcement and citizens from animal attacks. You should examine the totality of the circumstances to determine whether the shooting of the dog was reasonably necessary to effectuate the performance of the law enforcement officer's duties in executing the search warrant. To determine whether the shooting caused the plaintiff to suffer the loss of a federal right, you must determine whether a reasonable officer would have shot the dog under similar circumstances. The reasonableness must be judged from the perspective of a reasonable law enforcement officer on the scene, rather than with hindsight.

In summation, plaintiff's counsel urged the jury to find that the shooting was unreasonable under all the circumstances. The circumstances that counsel emphasized were the absence of both a plan to neutralize the dog using non-lethal means and adequate training on how to use non-lethal means against animals during warrant executions. Despite these arguments, the jury returned a verdict for defendants.

STANDARD OF REVIEW

I. Rule 50(b)

Under Rule 50(b) of the Federal Rules of Civil Procedure, a party may move for judgment as a matter of law following a jury verdict provided that the party had previously moved for judgment as a matter of law under Rule 50(a) before the case was submitted to the

jury. Fed. R. Civ. P. 50(b). The court may grant judgment as a matter of law where “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” Fed. R. Civ. P. 50(a)(1). Judgment as a matter of law “is reserved for those rare occasions when there is such a complete absence of evidence supporting the verdict that the jury’s finding could only have been the result of [f] sheer surmise and conjecture, or the evidence [was] so overwhelming that reasonable and fair minded persons could only have reached the opposite result.” *Sorlucco v. New York City Police Dep’t.*, 971 F.2d 864, 871 (2d Cir. 1992) (quoting *Stubbs v. Dudley*, 849 F.2d 83, 85 (2d Cir. 1988), *cert. denied*, 489 U.S. 1034 (1989)) (internal quotations omitted); *accord Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 557 (2d Cir. 2011) (quoting *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 133 (2d Cir. 2008)).

As the Second Circuit has counseled:

In ruling on a motion for [judgment as a matter of law], the trial court is required to “consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.”

Tolbert v. Queens Coll., 242 F.3d 58, 70 (2d Cir. 2001) (quoting *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 367 (2d Cir. 1988)). The court may not “consider evidence favorable to [the moving party] that the jury need not have believed[;] [t]hat is, [the court] must disregard contradicted evidence and testimony from impeached and interested witnesses that supports [the moving party].” *Gronowski v. Spencer*, 424 F.3d 285, 292 (2d Cir. 2005); *Tolbert v. Queens Coll.*, 242 F.3d at 72 (district court erred by crediting testimony of interested witnesses for moving party).

II. Rule 59

Rule 59 permits a court to order a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). Under Rule 59, unlike Rule 50, “a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner,” *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998), and, in that sense, the Rule 59 standard is “less stringent” than the Rule 50 standard, *Brady v. Wal-Mart Stores, Inc.*, 455 F. Supp. 2d 157, 179 (E.D.N.Y. 2006), *aff’d*, 531 F.3d 127 (2d Cir. 2008). To order a new trial under Rule 59(a), the court must conclude that “the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice.” *Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003) (internal quotations omitted).

DISCUSSION

Plaintiff contends that no rational trier of fact could conclude that the shooting of plaintiff’s dog was reasonable where the proof included evidence that: (1) the County failed to provide training in how to control dogs during the execution of search warrants, and (2) the officers had no plan for using non-lethal means to neutralize the dog that was known to be in plaintiff’s residence. Plaintiff made the same argument to the jury in summation, and the jury rejected it. I conclude that their verdict was neither against the weight of the evidence nor a miscarriage of justice.

As an initial matter, I note that the jury instructions properly charged them that the reasonableness of a seizure turns on the totality of the circumstances. *Tennessee v. Garner*, 471

U.S. 1, 8-9 (1985) (“question [is] whether the totality of the circumstances justified a particular sort of search or seizure”). Indeed, plaintiff does not argue that the instructions were either inadequate or inaccurate. Rather, she argues that the jury’s consideration of the totality of the circumstances was so flawed that it must be rejected.

Plaintiff has not cited, nor has this Court found, any Second Circuit authority identifying the factors that should be considered in determining the reasonableness of a dog shooting during a warrant execution. Instead, plaintiff relies heavily on a Ninth Circuit decision finding that a search team’s failure to create a “realistic non-lethal plan” for controlling dogs known to be on the premises prior to executing a knock-and-announce warrant was unreasonable. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 976 (9th Cir. 2005), *cert. denied*, 546 U.S. 1061 (2005). In that case, the executing team knew in advance that guard dogs were present at the homes to be searched and had one full week to plan to execute the warrants. *Id.* The Court held that the shooting of the dogs was unreasonable – and qualified immunity properly denied by the district court – where “the full extent of the plan to protect the entry team from the dogs was to either ‘isolate’ or shoot the dogs[, even though] [t]he officers had no specific plan for isolating the dogs.” *Id.*

This case differs from *City of San Jose* in two important respects: first, that the officers confronted the dog upon their entry inside the residence, rather than in yards outside the premises as in *City of San Jose*; and, second, that the warrant was a no-knock warrant, rather than a knock-and-announce warrant as in *City of San Jose*. As the testifying officers explained, the elements of speed and surprise are critical in executing no-knock warrants in order to ensure both the preservation of evidence and the safety of the executing officers. With respect to the latter

interest, DeSain testified that where, as here, officers surprise occupants by breaking through the front door, the officers must exit the doorway as quickly as possible because the doorway presents an easy target. Under these circumstances, the jury reasonably could have concluded that the dog's behavior posed a threat to the officers' ability to disperse quickly and safely. In addition, the proof demonstrated that the dog acted aggressively towards Carroll – barking, growling and baring its teeth as it rushed at Carroll – and that the plaintiff was too far away to restrain the dog. In other words, the jury also had proof that the dog posed a direct threat to Carroll's physical safety. Finally, the jury was presented with no evidence that any particular non-lethal alternatives would have been effective to neutralize the dog under the circumstances presented. Considering all the circumstances, the jury was rational in finding that neither training nor a plan would have affected the outcome.

For these reasons, I conclude that the trial evidence supports the jury's finding that the shooting was reasonable and that their verdict does not constitute a miscarriage of justice. *See, e.g., Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210-11 (3d Cir. 2001) (shooting of dog not unreasonable where dog poses imminent or immediate threat); *Erwin v. Cnty of Manitowoc*, 872 F.2d 1292, 1299-1300 (7th Cir. 1989) (remanding for new trial after inconsistent jury findings to determine whether officer who shot the dog acted in self-defense); *Esterson v. Broward Cnty. Sheriff's Dep't.*, 2010 WL 4614725, *4 (S.D. Fla. 2010) (shooting of dog was reasonable where officer reasonably felt threatened); *Kincheloe v. Caudle*, 2009 WL 3381047, *7 (W.D. Tex. 2009) (reasonable to shoot dog if dog poses imminent threat to officer safety); *Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 271-72 (D. Conn. 2005) (same); *Warboys v. Proulx*, 303 F. Supp. 2d 111, 118 (D. Conn. 2004) (shooting of dog was reasonable where dog approached

officer quickly and could not be restrained by owner; “law [does] not require [officer] to wait until the approaching animal was within biting distance or was leaping at him before taking protective action”).

CONCLUSION

For the foregoing reasons, plaintiff’s motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (**Docket # 79**) is **DENIED**.

IT IS SO ORDERED.

s/Marian W. Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
March 9, 2012

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRY CARROLL, as Natural Parent &
Legal Guardian on behalf of David Carroll,

Plaintiff,

-VS-

COUNTY OF MONROE and
DEPUTY SHERIFF JAMES CARROLL,
in his Individual Capacity,

Defendants.

NOTICE OF APPEAL

Civil No.:07-CV-6123

NOTICE IS HEREBY GIVEN that the Plaintiff, Sherry Carroll, hereby appeals to the United States Court of Appeals for the Second Circuit from the Decision and Order signed by the Honorable Marian W. Payson, United States Magistrate Judge, Western District of New York, dated March 9, 2012.

Dated: March 12, 2012
Rochester, New York

Respectfully Submitted:

Christina A. Agola, PLLC

s/ Christina A. Agola

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRY CARROLL, as Natural Parent &
Legal Guardian on behalf of David Carroll,

Plaintiff,

-vs-

COUNTY OF MONROE and
DEPUTY SHERIFF JAMES CARROLL,
in his Individual Capacity,

Defendants.

CERTIFICATE OF SERVICE

Civil No.: 07-CV-6123

PLEASE TAKE NOTICE, that on March 12, 2012 the undersigned submitted by filing with the Office of the Clerk for the United States District Court for the Western District of New York and delivery upon opposing counsel:

Paul D. Fuller, Esq.
Monroe County Law Department, Litigation Division
39 West Main Street, Suite 307
Rochester, New York 14614

the Notice of Appeal from the Decision or Order, dated March 9, 2012, in the above-referenced matter.

Dated: March 12, 2012
Rochester, New York

Respectfully Submitted:

Christina A. Agola, PLLC

s/ Christina A. Agola

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Attorney for Plaintiff-Appellant
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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MANDATE

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of March, two thousand and thirteen.

Before: JOSEPH M. WALKER, JR.,
ROBERT A. KATZMANN,
GERARD E. LYNCH,
Circuit Judges.

SHERRY CARROLL, Individually and as Natural Parent
and Legal Guardian on behalf of David Carroll & Devan
White, both Infants under the age of eighteen,

Plaintiff-Appellant,

v.

COUNTY OF MONROE; MONROE COUNTY SHERIFF'S
DEPARTMENT; PATRICK M. O'FLYNN, Sheriff of
Monroe County in his Official Capacity; DEPUTY SHERIFF
JAMES CARROLL, in his official and individual capacity,

Defendants - Appellees.

JUDGMENT

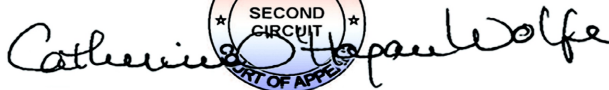
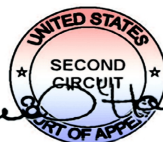
Docket No. 12-975

The appeal in the above captioned case from a judgment of the United States District Court for the Western District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED in accordance with the opinion of this court.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




MANDATE ISSUED ON 04/04/2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SHERRY CARROLL, Individually and as
Natural Parent & Legal Guardian on behalf of
David Carroll & Devan White, both Infants
under the age of eighteen (18),

Plaintiff,

v.

COUNTY OF MONROE, et al.,

Defendants.



ORDER

07-CV-6123P

A certified copy of the Mandate of the United States Court of Appeals for the
Second Circuit, dated and issued as Mandate on April 4, 2013, having been filed in the Office of
the Clerk of this Court on April 4, 2013, it is hereby

ORDERED, ADJUDGED AND DECREED, that said Mandate be, and hereby is,
made the Judgment of this Court.

IT IS SO ORDERED.

Marian W Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
April 5, 2013